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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS OF COLORADO

AT THE

APRIL AND SEPTEMBER TERMS
A. D. 1913

E. T. WELLS
REPORTER

VOLUME 24

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MAR 12 1914

COURT OF APPEALS OF COLORADO

REGULAR TERMS BEGIN ON SECOND MONDAY IN JANUARY, APRIL AND SEPTEMBER

JUDGES OF THE COURT DURING THE TIME OF THESE REPORTS

*LOUIS W. CUNNINGHAM, PRESIDING JUDGE.

ALFRED R. KING,
EDWIN W. HURLBUT,
WILLIAM B. MORGAN,
†JOHN C. BELL.
} ASSOCIATE JUDGES

BENJAMIN GRIFFITH, ATTORNEY GENERAL
JAMES R. KILLIAN, CLERK
A. W. GRANT, CHIEF DEPUTY CLERK
EBENEZER T. WELLS, REPORTER

* After January 17, A. D. 1913.
† After February 22, A. D. 1913.

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Errata

At foot of opinion of King, J., in Sedgwick vs. Culp, 581, insert Hurlbut and Morgan, J.J., concur.

REPORTS

OF THE

DECISIONS OF THE

COURT OF APPEALS

OF THE

STATE OF COLORADO

April Term, 1913

[illegible]

[illegible]

1. EVIDENCE—*Conclusive.* The recital in the county treasurer's deed as to when a notice of a tax sale was published is not conclusive evidence of the date of such publication.

2. TAX TITLES—*Deed as Evidence.* A tax deed, valid upon its face, issued under Mills' Stat. sec. 3913 [illegible] prima facie that the sale was authorized by law. The party asserting the contrary has the burden of proof.

3. —— *Sale—Advertisement—Evidence.* The affidavit of the publisher of the notice of a tax sale that the first publication was published four weeks and gave the date of the last publication. Though the first publication must be made at least four weeks before the day of sale, the publisher's affidavit need not recite any evidentiary statement as to this date. Conforming to the provisions of the statute it is sufficient.

4. —— *Treasurer's Notice of Sale—Time of Posting.* In computing the time during which the notice of a tax sale is posted it is proper to include the first day, and exclude the last, or *vice versa.*

5. —— *Notice Posted on Sunday.* The treasurer's notice of a tax sale posted on Sunday takes effect, at least, upon the Monday following; and if four weeks then intervene, before the day of sale, and the notice remains continuously posted, it is sufficient. *Schwed v. Harwitz,* 23 Colo., 187, distinguished.

6. —— *Tax Sale Redeemed—Effect on Prior Sale.* A sale for taxes from which redemption is made by the purchaser at a prior sale is without effect to impair the right of such prior purchaser.

7. —— *Tax Deed Not in Evidence,* will not be considered.

8. —— *Delay in Applying for Tax Deed.* Under Rev. Stat., sec. 5726, the purchaser at a tax sale may apply for his deed at any time after the lapse of three years from the date of the sale, within the period of prescription.

9. QUIETING TITLE—*Decree.* A decree quieting title in defendant is not impaired by a clause dismissing plaintiff's action.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. ISAAC PELTON, appellant *pro se.*

Mr. EGBERT MORE, for appellee.

HURLBUT, J., delivered the opinion of the court.

December 30th, 1906, in the county court of Washington county, appellant, as plaintiff, instituted suit against appellee, defendant, to quiet title to land in said county. Plaintiff was successful and the case was appealed to the district court. The cause was tried in the district court and resulted in a decree for defendant. The decree recites that defendant was the sole and absolute owner of the land in controversy, by virtue of the tax deed of May 17th, 1906. At the trial said deed of May 17th was admitted in evidence without objection. Plaintiff in his complaint pleaded that defendant claimed to be the owner of the premises by virtue of said tax deed, but alleged the same was void and conveyed no title, for the reason

that there was not published in any newspaper a notice of the delinquent tax sale, nor any list of such delinquent taxes for the time and in the manner required by law; that no publisher's affidavit of printing notice and list was made and filed with the treasurer; that the treasurer did not make and deposit with the county clerk a sufficient affidavit showing the posting of notice of sale; and that no copies of a newspaper containing such list and notice were delivered by carriers or mail to the subscribers of such paper. The pleadings formed an issue upon these objections to the tax deed. By a careful reading of the record we are satisfied the trial court did not err in finding against plaintiff upon these issues, as sufficient proof is wanting. Section 3883, Mills' Annotated Statutes, provides that the treasurer shall give notice of contemplated sale of real property for delinquent taxes by publishing the same once a week, for not less than four weeks, in a newspaper of his county, and shall also post a printed or written notice in a conspicuous place on or near the outer door of his office, for not less than four weeks before the sale; section 3884, that the printer who published such notice shall transmit to the treasurer an affidavit of such publication; and section 3885, that the treasurer shall make or cause to be made an affidavit of the posting of such list and notice, at his office as aforesaid, and he shall deposit such affidavit, together with the said affidavit of the publisher, in the office of the county clerk of the county, to be there preserved. The record shows that the affidavit of the publisher, sworn to October 3rd, 1907, and the affidavit of the treasurer, sworn to September 12th, 1907, both in substantial conformity with the statute above mentioned, were filed with the county clerk and recorded on October 8th, 1907. Section 3883 reads in part as follows:

"The treasurer shall give notice of the sale of real property by the publication thereof once a week for not

less than four weeks in a newspaper in his county, * * * the first of which publications shall be at least four weeks before the day of sale."

The affidavit of the publisher does not purport to state the date of the first publication of the notice of sale, nor does the statute require it, but there appears in evidence a *certificate* of H. S. George, county treasurer, made December 3rd, 1891, which contains this clause:

"Said lands and lots were advertised in the Pioneer Press, a newspaper published in the town of Akron, Washington county, and state aforesaid. Said tax list appeared in the issue of the Pioneer Press on September 11, 18, 25, and October 2, 1891."

Counsel says that this conclusively shows the first publication of the notice of tax sale to have been on September 11th. It is not necessary to consider this contention. The certificate is not evidence. The statute did not require any such certificate from the treasurer. It is an extra-judicial statement on his part, and should be disregarded. The publisher's affidavit recites that the "notice and list were published in said newspaper once in each week for four successive weeks, the last of which publications was made prior to the 5th day of October, A. D. 1891." This averment is supported by the oath of the treasurer, as required by statute. Its absence from the affidavit would render the tax deed wholly void. At the trial, plaintiff's own witness, who had formerly been connected with the paper, would not testify that September 11th was the first day on which the list and notice of sale were published. We also observe that the affidavit of H. S. George, treasurer, filed with the clerk, stated that "On or before the 6th day of September, A. D. 1891," he posted "a true, full and complete *printed* notice of sale of lands in said county of Washington * * * in and for the year 1891 * * * in the office commonly

used as the office of treasurer of said county." If any presumption is permissible from these recitals, it would be that the first publication of the notice was on or before September 6th, otherwise no *printed* notice thereof would have been available for posting.

The tax deed confirming title in defendant having been admitted in evidence without objection, if valid on its face, under sec. 3902, Mills' Annotated Statutes, was *prima facie* evidence in all courts "that the property was advertised for sale in the manner and for the length of time required by law." As to whether or not the notice and list were advertised in the manner and for the time stated in the publisher's affidavit, and as required by law, was an issue before the court which was resolved in favor of defendant, and sufficient evidence appearing from the record to sustain such finding it will not be disturbed on appeal. Appellant says, however, that the evidence shows the first publication of the notice of tax sale did not occur four weeks before the day of sale as required by statute, and that the treasurer did not post the notice and tax list for not less than four weeks before the sale. As to these contentions, the affidavit of the publisher strictly conforms to the statute and closely follows the form of affidavit prescribed therein. The form does not require the affiant to state the date of the first publication of the notice and list. That part of the form material to notice, sec. 3883, ib., reads as follows:

"I, A— B—, publisher (or printer) of the ....., a ..... newspaper, printed and published in the county of ...., and state of Colorado, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for .... successive weeks, the last of which publications was made prior to the .... day of ...., A. D. ...."

Although the form does not require a statement that

the first publication of the list and notice was at least four weeks before the days of sale, sec. 3883, ib., requires such publication to be so made. After the tax deed had been admitted in evidence without objection, being good on its face, defendant was entitled to the full benefit of the statutory *prima facie* presumption that "the property was advertised for sale in the manner and for the length of time required by law." This question was one of the issues and was decided in favor of defendant, and there is no evidence that we can find showing that the first publication was not made at least four weeks before sale.

It is also asserted that the evidence shows no sufficient affidavit of posting was made and filed with the treasurer, and that as a matter of fact no sufficient posting of the list and printed notice was made by him. The treasurer's affidavit of posting recites that "on or before the 6th day of September, A. D. 1891," he "posted a true, full and complete printed notice of sale," etc., and "that the said notice of sale and delinquent tax list remained so posted for four consecutive weeks next preceding the commencement of the sale," etc. Now if it be true, as asserted by appellant, that the 6th day of September was on Sunday, and no posting could be legally made on that day, then it should be excluded from the computation concerning the length of time the notice was posted. If the physical act of the treasurer in posting the notice on Sunday was of no validity, as contended for by counsel, then the 7th day of September should be taken as the first day of such posting. The affidavit shows that it remained posted that day and every day thereafter until the day of sale, October 5th. If we include the 7th of September and exclude the 5th of October, there remain twenty-eight full days, or four weeks of time before midnight of October 4th, at which time the day of sale began. If we exclude the 7th of Septem-

ber and include the 5th of October, the day of sale, we still are within the statute and the required four weeks notice had been given, as held by the supreme court (*post*). For many years it has been a vexed question and much mooted in the courts as to what is the proper rule in determining the time necessary to constitute notice in cases of this kind. Our own supreme court, in *Stebbins v. Anthony,* 5 Colo., 348, and *In re Tyson,* 13 Colo., 482, 22 Pac., 810, 6 L. R. A., 472, has adopted the rule that in making the computation of time it is proper to include the first day and exclude the last, or exclude the first day and include the last.

Appellant's counsel further says that if the notice referred to by the treasurer in his affidavit was posted on Sunday it was without the least efficacy, and cites *Schwed v. Hartwitz,* 23 Colo., 187, 47 Pac., 295, 58 Am. St., 221. The question in that case arose as to whether or not a notice of tax sale published only in the Sunday edition of a daily paper was a sufficient publication to satisfy the statute. The court held it was not. No such situation arises here. The statute we are considering contemplates a single act of posting a notice by the treasurer in a certain place within a prescribed time, and imposes on him the further duty to see that it remains so posted until the day of sale. The purpose of the statute is to give the fullest publicity to the notice of tax sale and list of delinquent taxes. As appears from the affidavit, any citizen or taxpayer could have seen this notice posted at the treasurer's office on the 7th day of September and every day thereafter until the day of sale, and if four weeks intervened from the 7th day of September to the day of sale the statute was fully conformed to in that respect.

Appellant appears to have entirely overlooked the fact that the burden of proof was on him to establish the failure and omission of the revenue officers to follow the

statute in the proceedings which culminated in the tax deed in question. The tax deed was admitted in evidence without objection and was good on its face and not subject to attack on any grounds other than those pleaded by plaintiff as vitiating the same.

The only publication in evidence containing a description of the land in issue was a printed sheet which appellant's attorney designated as the "Akron Pioneer Press Supplement." It was admitted without objection. Not a scintilla of evidence, however, can be found in the record showing when it was published, or whether it was published separately or at the time and in connection with the regular edition. The record is silent as to whether it was published more than once or once a week for four successive weeks prior to date of sale, or whether or not the first publication thereof was at least four weeks before the day of sale. The affidavit of publication states that the notice and list were published in the "Akron Pioneer Press" once a week, etc. Not a word of testimony shows the contrary. Not a single copy of the "Akron Pioneer Press," published within four weeks of the sale, was offered in evidence. If such had been offered, an inspection of the same would have disclosed the presence of the notice and list in its columns, or their absence therefrom. In fact no evidence is discoverable from the record which sustains any of the averments of the complaint which challenge the validity of the tax deed by reason of failure to properly advertise the sale, or failure to make and file affidavits required by statute. Taken as a whole, plaintiff's evidence tends to support defendant's case. Mr. Pickett, plaintiff's chief witness, testified as follows:

"Q. What paper were you either the editor or publisher of at that time?

"A. Akron Pioneer Press.

"Q. Mr. Pickett, in the year 1891, how many times was the delinquent list published in the Akron Pioneer Press?

"A. My recollection is it was four times."

The record here shows that one Emerson was the purchaser of the property at the tax sale on October 5th, 1891, for the delinquent taxes of 1890. The certificate of purchase was issued that day, and some fifteen years afterwards, viz., May 15th, 1906, Emerson assigned said certificate to appellee, who secured the tax deed and recorded the same May 17th, 1906. It seems that subsequent to the date of sale the property was sold at two different times for delinquent taxes, but redemption was made in each case by appellant's predecessor. The land was also sold in 1895 for the delinquent taxes of 1894. Upon this sale a tax deed was afterwards issued to one Lindbeck. At the trial no effort was made whatever to put this deed in evidence as supporting title in Lindbeck, appellant's grantor. Appellant contends that under this state of the record the three subsequent sales for delinquent taxes extinguished Emerson's lien upon the property. There might be something in this contention if appellant were here relying upon the Lindbeck tax deed and had the same in evidence showing on its face a good title. Such, however, is not the case. The Lindbeck deed is not set out in the abstract, nor was it offered in evidence as a muniment of title. It is not entitled to any consideration as against appellee's title. The two other tax sales, having been redeemed from and not having ripened into deeds, in no way weaken appellee's title under his tax deed.

Appellant also asserts that appellee abandoned his right to procure the tax deed by reason of the long period of time intervening between the sale and execution of the deed. We are not referred to any statute or decision of

this state supporting his contention in that behalf. Section 5726, Revised Statutes, 1908, provides among other things that, "At any time after the expiration of the term of three years from the date of the sale of any land, or interest in land, or improvements thereon, for taxes, under the provisions of this act, on demand of the purchaser * * * the treasurer then in office shall make out a deed for each such lot, parcel, interest or improvement, so sold and remaining unredeemed, and deliver the same to such purchaser or lawful holder of such certificate or order * * * ."

Under this provision of the statute the purchaser, or his assignee, is vested with the right to demand his deed any time after three years from sale, at least within the period of prescription.

It is further asserted by appellant that the decree in terms dismissed the action and at the same time decreed the defendant to be the owner of the premises in dispute, and, further, quieted the title to the same in defendant as against plaintiff. This it is claimed renders the decree void. We see no merit in this contention. The answer pleaded title in defendant and in its prayer asked for general relief. At the trial the issue was squarely presented as to who was the owner and entitled to the property in dispute. Each party in his prayer asked that the title to the same be quieted in him. The court having found in favor of defendant decreed to him full relief, which the evidence and proof showed him to be entitled to. The decree was right, and administered substantial justice under the issues, and the mere recital therein "that the action be dismissed," was in no way prejudicial to appellant's rights. Plaintiff, having challenged the validity of the tax deed by reason of the defects pleaded by him, assumed the burden of sustaining his contention by sufficient proof. In this we think he failed.

Finding no error in the record the judgment will be affirmed.

Decided January 13, A. D. 1913. Rehearing denied April 14, A. D. 1913.

[No. 3556.]

PARK ET AL. v. McKEE ET AL.

1. EQUITY—*Reformation of Writing.* A mistake in the phraseology of a written contract by which it is made to depart from the intent of the parties may be reformed, and the contract as so reformed enforced, in the same action.

The evidence held amply sufficient to establish the mistake charged.

2. PRACTICE—*Failure to Decree upon Cross-Complaint.* Failure to dispose of a cross-complaint interposed by the defendant is not fatal error. *Pace v. Cline*, 22 Colo. App. 254, followed.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

Messrs. LEE & AYLESWORTH, for appellants.

Mr. JOHN H. SIMPSON, for appellees.

CUNNINGHAM, Presiding Judge.

The appellees here, as plaintiffs below, brought their action to have a certain contract or agreement, hereinafter referred to, reformed, and as reformed specifically performed, and for damages.

The allegations of the complaint were, in substance, that Park and Bell, on December 31, 1904, entered into a contract or agreement wherein and whereby it was provided that Park should transfer to Bell a tract of land situate in Morgan county, together with certain water rights, in exchange for a stock of merchandise which Bell was to transfer by bill of sale to Park. Pursuant to this agreement Park deeded the land to Bell, Bell transferred

the stock of merchandise to Park, and the latter took possession of the same. Later Bell transferred the real estate and the water rights, whatever they may be, to James M. McKee and Ed. F. Rose. McKee having died, his widow, Mary J., was appointed administratrix of his estate. The other McKees are heirs of James. Shortly before this suit was instituted, Bell also transferred or assigned the original agreement between himself and Park, which provided for the exchange of the land and water rights for the stock of merchandise, to the administratrix and Rose. This agreement contains the following clause pertaining to the water rights that were to be transferred by Park to Bell:

"Whereas, the first party (Park) has this day agreed and does hereby trade and sell to the second party (Bell) * * * five *shares* of water in the Weldon Valley Ditch Company for the irrigation of the same," meaning for the irrigation of the land which Park was trading to Bell.

It was developed on the trial, and was not disputed, that by some method of computation not necessary here to explain, eight *shares* of water in the Weldon Ditch Company constituted one water *right* in that company. (The italics, wherever used throughout the opinion, are ours.) This distinction between water shares and water rights was well understood by those interested in the ditch. It was alleged by the plaintiffs that the original understanding between Park and Bell, at the time of the preparation of the written agreement from which we have quoted, was that Park was to transfer to Bell as a part of the agreement five water rights and that the word "*shares*," as the same appeared in the agreement, was used inadvertently, and did not express the intention of the parties. Park transferred four water *rights*, or thirty-two shares of water in the ditch company, which is the equivalent of four water rights, but refused to transfer the additional eight shares or the additional one water

right, which the plaintiffs insisted it was his duty, under the agreement as it was intended by both parties to have been drawn, to do. The Ditch Company being but a nominal defendant, its answer and part in the trial need not be considered. After various pleadings, Park filed an answer containing a cross-complaint, denying that it was intended or that the agreement should have read, "five water rights," instead of "five water shares," but alleged, on the contrary, that the agreement expressed the true intention and purpose of the parties at the time it was made. In his cross-complaint Park charged that Bell represented and guaranteed the stock of goods to be worth at least $6,000, whereas it was worth not to exceed $4,550. He therefore prayed, in his cross-complaint, for damages against the plaintiffs in the sum of $1,450. He also asked to have the one water right quieted in him, that is, the one water right or eight shares which by their complaint the plaintiffs were seeking to recover. The decree of the court was in favor of plaintiffs, and was based upon general findings. The agreement between Park and Bell was reformed so as to read, "five water rights," instead of "five shares of water," and the decree further required, "that defendant, George R. Park, do deliver to the clerk of this court the certificate of stock, standing for and representing said one water right, duly assigned to the plaintiffs herein, and that the clerk of this court thereupon deliver the same to the said plaintiffs."

1. The evidence offered by the defendant Park is amply sufficient in itself to sustain the decree of the trial court reforming the contract. After McKee became interested in the land, he appears to have written Park concerning the one water right which the latter had not yet transferred, and which is the bone of contention in this case. Replying to McKee, under date February 12, 1906, Park wrote as follows:

"I do not think I will transfer all of the rights until

George C. Bell settles with me for what he owes. I hold his note, and also a small account amounting to somewhere about $70, and I do not know of any other way to collect same but by holding some of the water rights. * * * Of course I don't know anything about who bought the land, but will immediately turn what water belongs to the place over upon the payment of what the party owes to me whom I sold the place to," meaning, of course, Bell, as it was Bell to whom he sold the place. Park further testified, while being examined by the plaintiffs under the statute, as follows:

"Q. When this contract was sent you and you found the words in there 'five shares' did you intend to deliver to Mr. Bell simply five shares or five rights? A. I intended nothing that I can remember; I proposed to sign up the contract my son Robert made, whatever it was. You have the documents before you, the deed and the contract. Make all you can of them."

Robert Park, the son of the defendant, represented his father in the trade, and the defendant George Park testified:

"I told him (meaning Bell) that whatever my son Robert did there, I would stand behind him."

The son testified:

"As far as I am concerned five shares in the contract means five water rights. I reached the conclusion to turn over the five water rights after we had come to Hill's office. Mr. Hill got his information from me in drawing the contract (meaning the original agreement here in dispute) and it was an error on the part of the stenographer in getting 'water rights' and 'water shares' twisted. There is no doubt but what Mr. Hill gave it to the stenographer right, but there was some mistake in taking it down."

(Judge Hill was the attorney who drew the original agreement between the parties.) Appellee Bell also testified unequivocally that water rights instead of water shares was what was in the contemplation of both parties, and ought to have been included in the agreement.

2. The best that can be said for the defendant Park's contention, made in his cross-complaint, that Bell had misrepresented the value of the goods, is that the evidence on that point was conflicting. Moreover, it is not consistent with the statements contained in his letter to McKee, written some fourteen months after he had taken possession of the stock of goods, from which we have already quoted. It will be observed by reading this quotation that his only claim against Bell at that time was based upon a note and a small account, and that he was holding the water shares or water right to secure the payment of these two items. According to his testimony, if there was any discrepancy in the value of the goods as represented by Bell, and as found by invoice, this fact was known to Park long before the time when he wrote the letter to McKee.

3. Complaint is made in the brief filed on behalf of appellant Park that the trial court's decree is silent as to any affirmative finding on the defendant's cross-complaint, and, for this reason, it is insisted, the case must be reversed. This contention has been disposed of by us in *Pace v. Cline,* 22 Colo. App., 254, 125 Pac., 128, contrary to the contention of the appellant.

4. We have not overlooked the further objection of appellant, based on his plea in abatement, or in bar, which was injected into the case in the form of a supplemental answer, filed more than a year after the filing of the original answer. The matters set up in the supplemental plea in bar must have been quite as well known in August, 1907, when the original answer was filed, as in September, 1908, when the supplemental plea was filed. The trial

judge aptly remarked on the trial that the "record is so muddled up that I can't tell anything about it," meaning the contention that there had been a previous adjudication between the parties involving the same matter, which purported adjudication formed the basis for the plea in bar. We cannot say that the trial court committed error in overruling the plea in bar.

The judgment of the trial court is affirmed.

Decided January 13, A. D. 1913. Rehearing denied April 14, A. D. 1913.

[No. 3854.]

SANKEY V. CRAMER.

1. TRIAL—*Pleading and Evidence.* Evidence of matters nowhere alleged in the pleading is not to be admitted.

2. PRINCIPAL AND AGENT—*Duty and Disabilities of Agent.* A broker is employed to find a purchaser of mining property for a price named, and is to receive a special commission. Without informing his principal he attempts to sell the property for a very much larger sum. *Held* a palpable violation of the duty which he owed to the principal. *Held* further that if he had succeeded in his effort the principal might have recovered from him, not only what he had received above the price fixed in his employment, but the promised commission as well.

3. QUANTUM MERUIT—*For Services Rendered.* Whoever sues upon a *quantum meruit* for services rendered must establish the employment, the rendition of the service, and the reasonable value thereof.

The evidence examined and held insufficient upon all points.

4. APPEAL—*Judgment. Where,* by the plaintiff's own testimony, and by documentary testimony not susceptible of alteration or explanation, it appears that the plaintiff's case is without a merit, a judgment in his favor will be reversed, and the court below directed to enter judgment for defendant.

Error to Summit District Court. HON. CHARLES D. CAVENDER, Judge.

Messrs. VAILE, MCALLISTER & VAILE, for plaintiff in error.

Mr. JAMES T. HOGAN, for defendant in error.

CUNNINGHAM, Presiding Judge.

The appeal originally taken in this case was by the supreme court re-entered, on stipulation, as pending on error, before transfer to this court. The action was brought to recover a commission which plaintiff claimed on the sale of certain mining property. The complaint was filed August 5, 1904. The first paragraph of the complaint alleges that the amount involved is not over $2,000. The second, that plaintiff was a broker engaged in selling mining property. The third avers that on or about August, 1900, the plaintiff and defendant entered into an oral agreement whereby plaintiff was to act as broker for defendant and use his best endeavors to sell *certain mining property for defendant.* In the fourth paragraph it is alleged that the terms of the agreement required plaintiff to procure a purchaser for the property at a sum *not less than $20,000,* for which plaintiff was to receive as a commission the sum of $2,000. The fifth charged that plaintiff faithfully performed his part of the agreement, *and procured a purchaser,* giving the name thereof. This paragraph further avers that prior to July 1st, 1901, the defendant, ascertaining from the plaintiff who the prospective purchasers were, communicated with plaintiff's prospective purchasers, and thereafter sold the premises to one Edward Kent, trustee for them, for $25,000. So far, the complaint is based entirely upon a specific agreement. The sixth and seventh paragraphs apparently attempt to state a cause of action based on *quantum meruit* and read as follows:

"Sixth. That for the purpose of completing said sale the said defendant requested this plaintiff to go from

his home in Breckenridge, Colorado, to meet the said defendant in Denver on or about the 18th day of July, A. D. 1901, which said plaintiff did, and where and when said plaintiff further assisted defendant in making said sale, whereupon defendant promised and agreed in consideration of plaintiff's labor in behalf of making and consummating said sale, to pay him, the said plaintiff, therefor.

"Seventh. That the said commission agreed upon, to-wit: the sum of two thousand dollars, which plaintiff was to have and receive, is a reasonable compensation for such labor and service performed by plaintiff for defendant."

Whether these two paragraphs, which are the last in the complaint, state a cause of action on *quantum meruit* we need not determine for the reason that in his first instruction to the jury the trial judge advises them that:

"The plaintiff has elected to stand upon this latter cause of action and it is in law what is known as *quantum meruit.*"

This instruction was signed by the attorneys for both the plaintiff and defendant, and no exception was taken to it. We have been unable to find when in the record such an election was made, but, in the circumstances just stated, shall assume that such election was made, and consider the case as though plaintiff had stated a good cause of action on *quantum meruit.*

1. The record, which consists largely of correspondence between the parties, discloses that for almost a year the plaintiff, acting under his specific contract, unsuccessfully attempted to affect a sale of the property, and during all this time he represented to the defendant that he was selling it at $20,000 or thereabouts. At times he was very positive that he had found a purchaser, and that the sale would be consummated if more time was given

him, and the defendant, from time to time, at the solicitation of the plaintiff, granted an extension of time in which to complete the sale. Finally, on May 30th, 1901, Sankey wrote Cramer that it was his intention to take the property off of the market if it was not sold by July first, and again on June 22nd, in a letter, he assured the plaintiff that it was his fixed purpose to take the property off of the market by the first of July, if he, Cramer, had not found a buyer by that time.

During all this period of time, from August, 1900, to July, 1901, the plaintiff was attempting to sell the property to the Mecca Gold Mining Company for from $45,000 to $50,000. By his own testimony it appears that Cramer was to receive, if he could induce the Mecca Company to take the property at that price, something like $11,000 over and above his commission of $2,000, provided for in the agreement; the balance of the excess was to go to two other stockholders in the Mecca Company, presumably as a recompense for assistance they were to render Cramer, who was also a stockholder in the Mecca Company, in inducing that company to purchase the property at the price Cramer was holding it. The record also clearly shows that Sankey had no knowledge whatever, prior to the time he cancelled the sale agreement, that Cramer was attempting to get anything out of the property more than his commission, or that he was attempting to sell it at more than $20,000. It is true that Cramer was permitted to testify, over objections made on behalf of the defendant, that he had complained at the time of the agreement, to Sankey, that $2,000 was not a sufficient commission, and that Sankey then told him that he might add a reasonable amount to the price, but this testimony was improper, and its admission constituted reversible error, since there was no allegation in the complaint whatever to warrant its admission. On the contrary, it will be seen from the unequivocal allegations of the complaint

that he was to receive but $2,000. Further, it can scarcely be contended seriously that to add $30,000 to a $20,000 property is a reasonable raise. We have, therefore, this situation, which prevailed down to July 1st, 1901, when Sankey took the property off the market: Cramer was co-operating with two other stockholders of the Mecca Company to sell the property to his own company, for more than twice the minimum price at which it had been listed with him, and for his own unlawful gain. This notwithstanding he himself alleges in his complaint that he was to use his "best endeavors to sell for said defendant" the mining property in question, "at a sum not less than $20,000, *for which said services the plaintiff was to have and receive the sum of $2,000.*" This was such a palpable violation of every rule of law governing the relation of principal and agent as to make comment inadequate and the citation of authorities entirely unnecessary. Had Cramer succeeded in selling the property for $50,000, Sankey could have, in a proper action, recovered not only the excess, but the commission of $2,000, had the plaintiff retained that sum. A similar situation is discussed at length in *Collins v. McClurg,* 1 Colo. App., 349, 29 Pac., 299. We adopt the views therein expressed as our own, and approve the authorities there cited.

2. Looking upon the testimony of the plaintiff in its most favorable light, and disregarding entirely the very satisfying testimony given on behalf of defendant, which squarely contradicts that offered by the plaintiff, the only services that plaintiff rendered to defendant, after the defendant took the property from his hands, consisted of a trip from Breckenridge to Denver, made by the plaintiff at the suggestion of the defendant, which covered a day's time. On that day the defendant sold the mine for $25,000 to one Kent, trustee, who, it developed afterwards, was purchasing it for the Mecca Company. The plaintiff testified that he urged the defendant not to accept $20,000

for it, as he was about to do, and says that he told the defendant then that he was presenting it to the Mecca Company for $45,000. By much persuasion (so plaintiff testified) he induced the defendant to raise the price of the property from $20,000 to $25,000, and thereby the defendant received $5,000 more for the property than he otherwise would have done. For his services in this behalf he has been allowed a judgment of $2,000. There is no testimony whatever to show what such services are worth, and the only evidence in the entire case on the value of services was that offered by the plaintiff, who said that ten per cent was a very reasonable commission. This testimony was given without any reference to the particular property, the amount at which it was being sold, the labor rendered, the going rate of commissions, or anything of that sort. The plaintiff did not sell the property at all, but for nearly a year, by his own wrong, he prevented a sale satisfactory to the defendant being made. The testimony shows that during the day that plaintiff was in Denver, he did not say a word to the prospective purchaser, or even see him. There is nothing in the letter of Sankey to Cramer inviting him to come to Denver indicating that he desired him to come to assist in making a sale, and there is not a word in the record to show that he ever asked him to assist in closing the deal on the day it was made. But the letter from Sankey to Cramer, wherein the former invited the latter to come to Denver, does clearly show that Sankey desired to give Cramer an opportunity to buy the property at whatever price he, Sankey, might decide to sell it. While on the stand Sankey testified that when he met Cramer in Denver he told him that he had been offered $25,000 for the property, and, pursuant to his previous assurances, he now offered Cramer the refusal of the property at the same price and upon the same terms as to payments; that Cramer declined to accept the property or to take it

at that price. Although he was on the stand thereafter, Cramer does not dispute this testimony. We think it fair to assume that Sankey's only purpose in inviting Cramer to come to Denver was prompted by motives of good faith, and a desire to keep his word with Cramer and to give him an opportunity to purchase the property if he was then in a position to do so. The testimony of Cramer as to the new promise or agreement of Sankey to pay him for his services rendered in Denver on the date of the sale, is as follows:

"Q. Did he (meaning Sankey) tell you what he sold it (meaning the mining property) to those people for? A. He said he sold it for $25,000 when he came back (meaning when he came back from an interview after having left witness Cramer). I told him I had earned my commission and was entitled to it and should have it. *I do not remember his exact words, but I think he said,* 'You shall have it; you have worked hard on this and have earned your commission.' I do not recall any further conversation with Mr. Sankey * * * and I think he went home from Denver on the next day."

It is upon testimony of this character that this judgment, if upheld, must rest. We think it is quite insufficient. Furthermore, it appears that Cramer never made any demands upon Sankey for, or mention of, his commission until the complaint was filed, more than three years thereafter, and this notwithstanding much correspondence passed between the two men. During the time intervening between the date of the sale of the property and the bringing of this action, the record discloses that Cramer remitted money to Sankey for rents which the former had collected for the latter. It further appears that Cramer's attorney, under his instructions, wrote to the officers of the Mecca Mining Company, on July 13, 1901, demanding from these officers pay for Cramer's

services in making the sale of defendant's property to them, and his attorney advised them that he had been retained by Cramer to collect by due process of law from these officers the amount of plaintiff's demand.

3. The trial court committed other prejudicial error in the admission and rejection of testimony, the giving and refusing of instructions, and in remarks made to counsel during the trial in the presence of the jury, which, because of the conclusion at which we have arrived as to the disposition to be made of the case, it will not be necessary to consider.

In view of the conduct of the plaintiff in this case, as established by his own testimony, and by letters introduced on behalf of defendant, which were received without objection, and which could not be altered or explained away on a subsequent trial, the ends of justice require that the judgment in this case should be reversed and the case remanded with directions to the trial court to enter a judgment in favor of defendant, which is accordingly done.

Reversed and Remanded With Direction.

Decided March 10, A. D. 1913. Rehearing denied April 14, A. D. 1913.

[No. 3861.]

JOHNSON v. FIRST NATIONAL BANK OF DENVER.

1. TRIAL BY JURY—*Equity Causes.* Parties to an equity cause are not entitled as of right to a jury. If a jury is called the verdict is merely advisory.

2. ACTION—*Whether Legal or Equitable.* Action to reform a banker's certificate of deposit alleged to have been issued by the mistake of a clerk for a sum largely in excess of the amount deposited, and to restrain the negotiation thereof. Held an equitable action.

3. EQUITY—*Reformation of Writings—Mistake of One Party.* Equity

may reform a writing where the mistake is mutual, or where the mistake is by one party, and is accompanied by fraud or inequitable conduct by the other.

4. —— *Full Relief.* Action to reform a banker's certificate of deposit issued, by mistake of a clerk, for an excessive amount, and to restrain its negotiation. After service of process upon him the defendant negotiated the certificate to an innocent third party, receiving the amount named therein. A decree required him to repay to the bank what he had received in excess of his deposit, and committing him until payment, was affirmed.

Error to the Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. O. N. HILTON, and Mr. CAESAR A. ROBERTS, for plaintiff in error.

MESSRS. HUGHES & DORSEY, and Mr. BARNWELL S. STUART, for defendant in error.

CUNNINGHAM, Presiding Judge.

Johnson, plaintiff in error, to whom we shall hereafter refer as defendant, on March 30, 1907, entered the banking house of the defendant in error, to whom we shall refer as plaintiff, where and when he paid a certain sum of money to one of plaintiff's tellers, and received therefor a certificate of deposit in the sum of $315. The controversy out of which this action grows arises over the contention as to the amount of money actually paid to the teller by defendant. Plaintiff contends that it received but $35, while the defendant insists that he paid $315, the full amount of the certificate of deposit issued to him. When defendant delivered his money to the teller, that official filled in a partly printed slip or ticket by writing certain figures thereon and placing an initial letter indicating that a certificate of deposit was desired, and passed the same to a clerk of the bank. Thereupon the clerk wrote out a certificate of deposit to *W.* J. John-

son for $315.00, and, after having the same signed by a third official of the bank, handed it, together with the ticket which he had received from the teller, back to the teller, who, looking at the ticket, called out the name N. J. Johnson, whereupon the defendant stepped up and received from the teller the certificate of deposit for $315, and left the bank. At the close of the day the teller made up his books, which correspond with his cash. The clerk likewise made up his account of the day's business, and by comparing the same with the teller's account it was at once discovered that the clerk's account showed that he had issued drafts to the amount of $280 in excess of what the book or account of the teller indicated, whereas they ought to have corresponded. Thereupon the teller, in checking over the clerk's account with the tickets which he had handed to and received back from the clerk, discovered, as he says, that the Johnson ticket was meant by him for $35 only, and the clerk had read it $315. Thus the discrepancy, on the theory of the plaintiff, was explained. Promptly the bank wrote two letters, addressed to parties by the name N. J. Johnson, who the directory showed lived in different parts of the city. One letter was returned to the bank with the notation that the party had moved. The other letter, addressed to the street number where the defendant had lived for many years, was never returned to the bank, although the return card of the bank was upon the envelope so addressed. This letter the defendant denies ever having received. A few days later a representative of the bank called upon the defendant and advised him that an error had been made in his certificate of deposit, and asked him to come to the bank. This the defendant declined to do, and disputed the statement that there had been any error, or, if so, that the error "was not on him," to use his language. Still later two representatives of the bank called on the

defendant, with the same result. On June 13, 1907, the bank filed its complaint in the district court, alleging its error or mistake in the issuance of the certificate of deposit substantially as we have stated; its inability to induce the defendant to surrender the certificate, or to permit its correction; the insolvency of the defendant; its want of a speedy or adequate remedy; that the defendant threatened and was about to negotiate the certificate, and the irreparable damage that such negotiation would entail upon it. Plaintiff further offered in its complaint to deliver to defendant a certificate of deposit for $35, and prayed for a mandatory writ of injunction requiring defendant to deliver the certificate to it, or to the clerk of the court; for a temporary writ restraining the transfer of the certificate, and for other equitable relief.

In due time a temporary restraining order was issued, and after certain proceedings the defendant answered, admitting the receipt of the certificate for $315, and alleging that he had paid $315 in money to the bank therefor. The insolvency of the defendant was not denied in the answer, and in an affidavit filed by him during the proceedings his insolvency was admitted. The summons was served personally on the defendant on June 14th. On the same day the defendant negotiated the certificate of deposit by purchasing from a clothing house a suit of clothes for $15, and receiving the difference between that amount and the face of the certificate, $300, in cash. The court found that the defendant had transferred the certificate of deposit to an innocent third party, for value, after the commencement of the suit, and the service of summons upon him. Other general findings were in favor of the bank, and the defendant was ordered by the court to pay in to the clerk of the court for the use of the bank $280, together with interest. After various citations, and after the defendant had been com-

mitted, he paid a portion of the judgment, and thereupon sued out the writ of error upon which this hearing proceeds.

1. On the trial of the cause on its merits the defendant testified unequivocally to the payment of $315 to the bank, describing with great accuracy the denomination of the bills, their appearance, and even the numbers thereof, that is, as to fourteen of them which he said were $20 gold certificates, numbered consecutively. These bills the defendant contended were new. It seemed to be his theory that the bank had treated them as bills that had never been emitted, and that its discrepancy in cash could be accounted for in this way. One witness introduced by defendant testified that he had cashed a check for defendant a few days before the transaction in question, in which he had paid him twelve or fourteen new gold certificates such as defendant described. His wife and son also testified to having seen him in the possession of such bills at or about the date of the deposit. In many respects defendant's testimony, and that given by members of his family, was far from satisfactory, particularly on the question of the source from whence he had acquired the funds which he deposited. In other respects the testimony of the defendant was in hopeless conflict with the two representatives of the bank who called upon him prior to the bringing of the suit. We think, from a reading of the record, that the testimony of the teller who received the money does not fairly show that he had any distinct recollection as to the amount of money he received, but relied for his information upon this point on what he claims the ticket made out by him at the time he received the money, and which he passed to the clerk as hereinabove detailed, discloses. The original ticket is brought up by bill of exceptions and is before us. It must be admitted that the figures on the

same might well be taken for $315 instead of $35. Indeed, we believe they would be so understood and read, in the absence of all other evidence, by an ordinary person. An expert witness was called by plaintiff, who, after examining many similar tickets made by the bank's teller, gave it as his opinion that it was intended by the teller to represent $35, rather than $315. We think it very questionable whether this is a subject for expert testimony, and would be inclined to rule that its admission was erroneous and prejudicial had the case been tried to a jury, but the case was tried to the court without a jury—a feature to which we shall presently direct our attention.

It seems probable that the teller intended the figures, when he made them, to represent $35, and in making up his book from these tickets he must have so read them. Otherwise his account and his cash would not have balanced. The clerk who wrote the certificate, it will be remembered, was intrusted with no cash and handled none, his duty being to write the certificates, drafts and instruments of that sort from the memoranda furnished him by the teller. Had the conduct of the defendant throughout been characterized by open frankness and honesty, the correctness of the trial court's judgment might well be questioned. But he admits having twice had notice of the bank's claim of error, and it seems probable that he received the letter written by the bank, which did not purport to state what the error consisted of, but simply that an error had been made, and asked him to call that the same might be corrected. There had been an error made by the clerk in writing the defendant's name in the certificate of deposit, which, as we have stated, showed the name as W. J. Johnson instead of N. J. Johnson, and is written with unusual legibility. Moreover, the circumstance and time of the negotiation

of the certificate by the defendant, as detailed above, is suspicious, to say the least, and tends to indicate a disposition on his part to so shape conditions as to prevent the bank from profiting by any judgment that it might obtain against him. We are satisfied that the evidence is sufficient to sustain the judgment which the trial court rendered in favor of the bank.

2. The principal contention urged in the brief filed on behalf of Johnson is predicated upon the refusal of the trial court to grant his request for a jury. The correctness of the trial court's ruling in this behalf turns entirely upon whether the action was one at law or equitable in its nature. If a law case, then the defendant was entitled to a jury trial. If the action was equitable, the defendant was not entitled, as a matter of right, to a trial by jury, and if a jury had been called its verdict would have been merely advisory and could have been disregarded by the court. The authorities on this question have been collated by Mr. Justice Bailey in *McClelland v. Bullis,* 34 Colo., 79, 81 Pac., 771.

It is true that there was a sharp issue of fact involved in the case, but this is not sufficient or necessarily important in determining whether the action was legal or equitable.

"Issues of law, as well as of fact, are triable by the court without a jury, subject, of course, to the discretion of the court to submit issues of fact to a jury, whose findings, however, would not be binding upon the conscience of the chancellor."—*Koch v. Story,* 47 Colo., 339, 107 Pac., 1095.

In *Cree v. Lewis,* 49 Colo., 190, 112 Pac., 327, it is said:

"The fact that plaintiff asked for a money judgment is by no means decisive that the action was one at law."

And, at page 191, same case:

"Wrongfully converting funds which belong to another does not create the relation of debtor and creditor, and nothing more. The owner of such funds may resort to a suit in equity to recover them if the facts justify that character of action."

Again, page 192:

"The fact that plaintiff might have contented himself with an action in assumpsit to establish and enforce his rights did not destroy his right to resort to a court of equity in order to do so. In the circumstances of this case, the choice of remedies rested with him."

See also *Zobel v. Fannie Rawlings Co.*, 49 Colo., 134-41, 111 Pac., 843, wherein it is ruled that:

"The court, having obtained jurisdiction of a cause, administers both equitable and legal relief in order to effect complete determination of the controversy and to settle the respective rights and liabilities of all the parties."—*Kyle v. Shore,* 18 Colo. App., 358, 71 Pac., 895.

In the case at bar only equitable relief was asked. It was an action brought solely for the purpose of correcting a written instrument so that the same might speak the truth, or express the intent of the parties, and to preserve the *statu quo* pending the action. The instrument upon which the suit was based was negotiable; the defendant was threatening to negotiate the same, and he was insolvent. These facts are undisputed.

"The correction of mistakes in written instruments, occurring by accident, fraud, or otherwise, has been one of the acknowledged branches of equity jurisprudence from the earliest history of the court. This jurisdiction exists, first, where there is a mutual mistake; second, where there has been a mistake of one party, accompan-

ied by fraud or other inequitable conduct of the remaining parties."—*Graham v. Guinn* (Tenn. Ct. Chan. App.), 43 S. W., 751.

As a condition precedent to the plaintiff's right to recover in this case it was obliged to establish the error or mistake alleged and procure the correction of the outstanding certificate of deposit, if the same still remained the property of defendant. This, by all the authorities, required the interposition of a court of equity or a tribunal possessing and exercising equitable jurisdiction. Indeed, no other relief was sought.

"The right to have an issue of fact tried by a jury is not determined by the nature of the issue, but by the character of the action in which such issue is joined."—*Cree v. Lewis, supra.*

"That a court of equity has power to compel the surrender of a worthless or invalid bond, or other instrument, which is negotiable and unmatured, and consequently in a condition to be used to the prejudice of the person who executed it, is a doctrine too familiar to need the citation of authorities in its support."—*City v. Baker,* 51 N. J. Eq., 59, 26 Atl., 27.

For other authorities supporting the conclusion that we have reached that this is an equitable action and triable to the court without a jury, see: *Ellsworth v. Holcomb,* 28 Ohio St., 166; *Rowland v. Entrekin,* 27 Ohio St., 47; *Lyle v. Williamson,* 29 T. B. Mon. (Ky.), 142; *Goodloe v. McLanathan, Id.,* 310; *Monett v. Turpey,* 132 Ind., 482, 32 N. E. 328; *Wyche v. Green,* 11 Ga., 159; *English & Co. v. Thorne,* 96 Ga., 557, 23 S. E., 843; *Ivinson v. Hutton,* 98 U. S., 79, 25 L. Ed., 66; *Gould v. Emerson,* 160 Mass., 438, 35 N. E., 1065, 39 Am. St., 501.

The judgment of the district court is affirmed.

Decided March 10, A. D. 1913. Rehearing denied April 14, A. D. 1913.

[No. 3876.]

NATHAN v. CROUSE.

1. USE AND OCCUPATION. The owner of lands occupied by another against his will is entitled to recover the reasonable value of such use and occupation.

Defendant's ancestor, having conveyed certain premises to plaintiff, afterwards instituted an action to annul the conveyance, as obtained by fraud. By the final decree of the district court the conveyance was sustained. Pending this action defendant occupied the premises. She was held liable to plaintiff for the reasonable value of such occupancy.

2. TRIAL—*Directing Verdict.* Where the plaintiff establishes a clear title to the relief which he demands the court should direct the verdict.

3. DEMAND—*Where Necessary.* The owner of lands occupied by another under a false claim of right is not under any requirement to make demand for rents, as a condition precedent to an action for use and occupation.

4. TRIALS—*Pleading and Evidence.* Plaintiff declared as at common law for the use and occupation of lands. In fact defendant's occupation was tortious, and this appeared by the answer and reply. Upon the trial no objection was made to the sufficiency of the complaint, or that the evidence presented by plaintiff was inadmissible thereunder. *Held* that any insufficiency or lack of form in the complaint was cured.

Error to La Plata District Court. HON. CHARLES A. PIKE, Judge.

Messrs. PERKINS & MAIN, for plaintiff in error.

Mr. REESE MCCLOSKEY, for defendant in error.

KING, J., delivered the opinion of the court.

Plaintiff in error filed his complaint stating two causes of action. The first alleged his ownership of certain real estate in the city of Durango and his right to rents and profits thereof, and that defendant used and occupied the same for the period of one year for which she was indebted to plaintiff, and demanded judgment for the reasonable value of such use and occupation.

The second cause of action was for waste committed upon said premises during defendant's occupancy thereof. To both causes of action defendant pleaded a general denial, and, as to the first, alleged that the real estate had been the property and in possession of defendant's mother; that plaintiff, through fraud and misrepresentation, procured a deed to said premises from defendant's mother, and that suit to set aside said deed had been commenced by her, and was undetermined at the time of her death, and was, by the administrator of her estate, continued and still pending during the time of defendant's alleged occupancy; that she had occupied the premises as a representative of said estate, and in no other capacity, and that plaintiff's claim, if any, was against said estate. For reply to the affirmative defense plaintiff alleged a judgment in the suit mentioned in said defense, against defendant's mother, and administrator, and in favor of the plaintiff, adjudging the plaintiff herein to be the owner and entitled to the possession of said premises, and alleged that the possession and occupancy, of both defendant and her mother, had been wrongful, and against the will and consent of plaintiff. The cause was tried to a jury and a general verdict returned in favor of the defendant, upon which judgment was rendered, from which plaintiff took said cause to the supreme court for review upon writ of error.

Plaintiff established legal title to the premises by certain deeds, including a quit claim deed from defendant's mother, and by a decree of the district court adjudging the title to said premises, and the right of possession, to be in plaintiff.

The court refused an instruction requested by the plaintiff directing a verdict in favor of plaintiff upon the first cause of action, and, among other things, instructed the jury that if it should find from the evidence that the

defendant and her mother had occupied the premises for a number of years, during which it was understood and agreed that no rent was to be paid, or was paid, for said premises, and that, upon the death of said mother, defendant continued to use and occupy the premises without any changed relationship in regard thereto, or any agreement to pay rent, or demand upon her for rent, until she voluntarily quit the premises, then she would have the right to presume that she was to continue to occupy the premises in the same manner and under the same conditions as existed prior to the death of her mother, and would not be liable to the plaintiff for the use and occupation of the premises. This instruction was clearly erroneous. The legal title was in the plaintiff, and both the title and right of possession, as against the defendant's ancestor, were established by decree of the district court, and were *res judicata* as to the ancestor and as well to the defendant claiming under her. The allegations of fraud and the right of possession were settled by the decree of the district court. Defendant's occupancy of the premises without the consent of the plaintiff was admitted. Demand for payment of rent, under the facts disclosed, was not required; it would have been nugatory. There was no evidence supporting the allegation that she occupied the premises as a representative of the estate. Plaintiff was entitled to a peremptory instruction directing a verdict in his behalf for the reasonable value of the use and occupation of the premises for the time so occupied by the defendant, as shown by the evidence, and the court erred in refusing to give such instruction.

Defendant in error contends that plaintiff cannot recover upon his complaint for use and occupation because no contractual relation existed between plaintiff and defendant, and urges his contention in an able argu-

ment supported by a strong array of authorities. Upon trial no objection was made by the defendant to the admission of testimony in support of plaintiff's complaint upon the ground that it did not state a cause of action; or, that the evidence was inadmissible under the pleadings. While in form the first cause of action was more nearly allied to the common law declaration for use and occupation of the premises by consent of the plaintiff, nevertheless, both causes of action were founded upon trespass predicated upon the wrongful possession of the defendant, and waste while so in possession.—*McClellan v. Hurd,* 21 Colo., 197, 203, 40 Pac., 435. The first was, in effect, an action of trespass for *mesne* profits brought after regaining possession of the realty.—38 Cyc., 1073; *Western Book & Stationery Co. v. Jevne,* 78 Ill. App., 668; *Winkley v. Hill,* 6 N. H., 391; *Scheffel v. Weiler,* 41 Ill. App., 85. And wherein that cause of action was inartificially or insufficiently stated, the defect was cured by subsequent pleadings of defendant and plaintiff, and by the admission of testimony without objection which supported that theory of the cause of action.—*Limberg v. Higenbotham,* 11 Colo., 156, 17 Pac., 481.

No errors are assigned nor objections urged as to the verdict or judgment upon the second cause of action.

There is no dispute as to the value of the premises, which was shown to be at least $30 per month for ten months and seventeen days of such occupation. For the reasons given the judgment upon the first cause of action is reversed, and the cause remanded with direction to the district court to enter a judgment in favor of the plaintiff and against the defendant for the sum of $317, as of the 14th day of June, 1909.

Reversed and Remanded.

Decided March 10, A. D. 1913. Rehearing denied April 14, A. D. 1913.

[No. 3847.]

ABERNATHY ET AL. v. WRIGHT.

APPEALS—*Docketing as Writ of Error.* No appeal, taken or attempted, since the repeal of the statute allowing appeals to the supreme court, and the repeal of sec. 423 of the Revised Code, can be re-entered as a writ of error, either in this court or the supreme court.

Appeal from Boulder District Court. HON. HARRY P. GAMBLE, Judge.

Messrs. MILLER, BARND & WILLIAMS, for appellants.

Mr. SAMUEL H. THOMPSON, for appellee.

Motion to Re-Enter as Pending on Error, and for Supersedeas.

Per Curiam.

On motion of appellee, the appeal herein was dismissed, without prejudice to the rights of appellants, if any they had to sue out a writ of error.—23 Colo. App., 81, 127 Pac., 450. Appellants now ask to have the cause re-entered on error, and for a supersedeas. An attempt was made to perfect the appeal herein by filing an appeal bond in the district court October 10, 1911. At that time, chap. 6, Session Laws of 1911, by which the right to take an appeal to the supreme court in any case was repealed, and which also repealed the provision of the Code of Civil Procedure which permitted a cause to be re-entered as pending on error when dismissed as an appeal for lack of jurisdiction, was, and for a long time prior thereto had been, in full force and effect. In our opinion, no appeal taken, perfected or attempted to be perfected after that act took effect can be re-entered as pending on error in this court or in the supreme court. When we dismissed the former

appeal, without prejudice to a writ of error, we did not contemplate the suing out of a writ of error from this court, but from the supreme court. For the reason given, the motion is denied.

[No. 3463.]

WESTERN INVESTMENT & LAND CO. V. FIRST NATIONAL BANK OF DENVER.

APPEALS—*Judgment Amended.* The judgment entered at a former day so amended as to apply to only the party appealing.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. E. W. SMITH, Mr. SIDNEY H. SMITH, Mr. L. WARD BANNISTER, for appellant.

Mr. HARRY E. KELLY, Mr. CHARLES H. HAINES, for appellee.

On Motion to Amend Former Opinion.

Per curiam.

The attention of the court has been called to the fact that the opinion filed herein on October 14th, 1912, appears to reverse the judgment of the court below as to the defendant, Frank J. Macarthy, as well as to his co-defendant, The Western Investment and Land Company. The appeal was taken by The Western Investment and Land Company only. No exceptions were taken to and no appeal prayed from the judgment of the trial court against the said Macarthy, and so far as the opinion of this court appears to reverse the cause as to him, it was unintentionally and inadvertently so written. The last paragraph of said opinion is hereby amended so as to read as follows:

"For the error of the court in withdrawing the cause from the jury and directing a verdict, the judgment, as to the appellant, The Western Investment and Land Company, will be reversed and the cause remanded for a new trial; but this opinion shall not affect the judgment of the trial court as to the defendant Frank J. Macarthy.

Reversed and Remanded.

[No. 3544.]

FINDING v. GITZEN.

1. APPEALS—*Presumptions.* It is presumed that conflicts in the evidence were resolved by the jury in favor of the successful party.

2. MASTER AND SERVANT—*Duty of Master to Avoid Exposing Servant to Unnecessary Perils.* One who, controlling a passenger elevator, directs the servant to clean the top of the car while in use, is under duty to exercise at least reasonable care to provide a competent and careful pilot, and to take every reasonable precaution, through such pilot, to so operate the car as to avoid injury to the other servant.

Clear notice and warning should be given of every contemplated movement of the car.

3. —— *Contributory Negligence of Servant—Intoxication,* is not negligence unless it occasions or contributes to the injury complained of.

4. —— *Assumption of Risk.* The servant assumes all risks ordinarily and naturally incident to the service, but not those which result from the master's failure to use reasonable care in providing reasonably safe machinery and appliances, a reasonably safe place for the servant's work, other competent servants, or his failure to use reasonable care to prevent injury to the servant.

5. INSTRUCTIONS—*As to an Issue Not Proven.* A party is not entitled to an instruction upon an issue made by the pleadings, but sustained by no evidence.

6. —— *Assuming Facts,* which are for the jury are properly refused; or those given in other words; or those which mistake the law.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. JULIAN G. DICKINSON, Mr. A. H. FELKER, Mr. GEORGE B. DRAKE, for appellant.

MESSRS. TALBOT & MANNIX, Mr. THOMAS WARD JR., Mr. G. D. TALBOT, for appellee.

HURLBUT, J., delivered the opinion of the court.

November 24, 1909, plaintiff (appellee) filed her complaint against defendant. The complaint alleged in substance that plaintiff was the widow of Henry Gitzen; that on June 29, 1908, Henry Gitzen was in the employ of defendant as a house painter and decorator, and under his instructions was on that day scraping the paint from the top of a passenger elevator in what is known as the Railroad Building in Denver; that at the time of the accident he was on the roof of the elevator, engaged in scraping off the paint with a knife, and while so engaged, without warning to him the elevator suddenly started to rise toward the upper floors of the building; that by reason thereof he was unable to maintain his hold on the top of the cage and was thereby precipitated and thrown into the shaft of the adjacent elevator, with such force and violence and from such a height that he received cuts, wounds and bruises from the effects of which he died the same day; that the injuries were caused by the carelessness and negligence of said defendant in this, to-wit: Defendant, having personal knowledge of the presence of Gitzen on top of the elevator, without warning or notice to him, recklessly, negligently and carelessly, and not in the exercise of ordinary care and prudence, ordered the pilot of said elevator, who was also the servant of said defendant, to transport him from the ground floor to one of the upper floors of the building; that said pilot immediately obeyed the order of defendant, set the machinery in motion, and caused the elevator to ascend to the upper floors of the building.

The answer contained four defenses: (1) Denial of most of the allegations of the complaint; (2) that if Gitzen received the injuries alleged in the complaint, they were the result of the ordinary dangers and risks incident to his employment, and were assumed by him; (3) that if such injuries occurred, the time and manner of doing the work by Gitzen was in direct disobedience of the orders of defendant; (4) that if the injuries occurred to Gitzen as alleged, they were the result of his carelessness, negligence and recklessness.

The evidence in this case is not voluminous. The appellant earnestly insists that appellee failed at the trial to show by sufficient evidence the negligence charged against him in the complaint. The following is a brief resumé of the evidence, viz.:

The accident occurred Saturday, June 27, 1908, about 4:30 p. m. A few days before Gitzen had been instructed by defendant to scrape the paint off the roof of the two elevators, which were located side by side. One was generally used as a freight elevator, and operated by pulling on a rope. The passenger elevator was operated in the usual way by a lever. The power came from machinery situated in the basement. It was necessary for Gitzen to be on top of the elevator in order to do the work assigned to him by defendant. The freight elevator was not operated for carrying passengers on the day of the accident. The engineer, Seltzer, for about fifteen minutes before the accident, had been standing in front of the elevator talking to Gitzen, who was on top of the same scraping off the paint. During this time the elevator had not been moved. Shortly after the engineer arrived at the elevator the defendant came in, passed by the front of the two elevators to the rear, and immediately returned, had a brief conversation with the engineer, and soon entered the elevator. The elevator at

once ascended, and while so doing, Gitzen fell from the roof into the adjoining shaft, and thence to the bottom. The statement of facts so far may be said to be uncontroverted. At this point, however, a decided conflict in the testimony takes place.

Defendant claims he did not see Gitzen on top of the cage, had no conversation with him, and did not know of his presence there.

As opposed to this the engineer testifies that before stepping into the elevator the defendant had a conversation with Gitzen, who was then on top of the cage. The elevator pilot, Kizer, testifies that just before he started the elevator, and while defendant was entering, he called to Gitzen, telling him he was going up, and that Gitzen replied, "All right. Go ahead." The engineer testifies that no such conversation took place; that he had good hearing, and was within four or five feet of the elevator when it started to ascend. Though defendant was present at the time, he nowhere in his testimony affirms or denies that his pilot warned Gitzen as stated. If the pilot gave the notice or warning, defendant must necessarily have heard it, or it is fair to assume he did, and, his interests being so deeply involved, it is passing strange that he did not verify the pilot's warning, if true. A failure to do so left an apparent conflict between his testimony and that of the pilot. The defendant's testimony that he "had no idea that anyone was on top of the elevator" is not consistent with the pilot's evidence that, in the presence of defendant, he gave notice to Gitzen and received his reply, "All right. Go ahead."

The disputed facts just stated must have been resolved by the jury in favor of plaintiff. The general rule is that all conflicting evidence upon material facts is presumed to have been resolved by the jury in favor of the successful party.

The defendant's undisputed testimony is to the effect that a few days before the accident he instructed Gitzen to scrape or varnish and finish the top of these two elevators on Saturday afternoon or Sunday, telling him, in substance, that at such times but few trips were made by the elevators, and but few people were then in the building. It is clear then that defendant knew these elevators would be running at the time he instructed Gitzen to finish the tops, and that defendant's purpose in selecting Saturday afternoon or Sunday for doing this work was because there would then be fewer passengers desiring to use the elevators, and consequently fewer trips would be made by them. This being the case, it became the unquestioned duty of defendant to exercise at least ordinary care in furnishing a competent and careful pilot for the elevators, and to take every reasonable precaution through such pilot to so operate the elevators while Gitzen was on top as to avoid injury to him. At the best it was a highly hazardous employment. There was but a small space on top of the elevator suitable for Gitzen to occupy while he was scraping the paint therefrom. It does not appear that any railing or other device was constructed on the top to prevent him from slipping off. The evidence seems to show that Gitzen's only protection against slipping from the top of the elevator was to grasp the cable, which was attached to the center of the cage. This he attempted to do when the elevator started, but failed. The highly dangerous position of Gitzen while scraping off the paint must have been so apparent to the defendant and elevator pilot that, in the exercise of the most ordinary kind of care, it would seem imperative that the raising or lowering of the elevator while Gitzen was so employed should in every instance have been immediately preceded by a clear notice or warning to him of the contemplated movement.

It must be conceded without dispute that, just before and at the time of the accident, Gitzen was working at the very time and place the defendant had instructed him to work, and doing the very thing he had instructed him to do, which makes it clear that he cannot be charged with negligence by reason thereof. There was some effort made to show that Gitzen had been drinking prior to the accident and was intoxicated at the time. The evidence in that behalf was weak and unsatisfactory. Even had it been conclusively shown that he had been drinking or was intoxicated at the time, there is not a word of testimony tending to show that by reason thereof he did anything or omitted to do anything which in any way contributed to the injuries received. In other words, drunkenness of itself is not negligence, unless it is shown that such a condition caused the accident, or in a measure contributed to the same.

We have searched the record critically, but fail to discover any evidence which tends to show Gitzen guilty of contributory negligence. For this reason we do not think defendant was entitled to an instruction upon that question.—*U. P. Ry. Co. v. Tracy,* 19 Colo., 331, 35 Pac., 537.

We will now give consideration to the errors claimed in the giving and refusing of instructions.

Defendant tendered thirty-one instructions, of which twenty-eight were refused. We do not think there was any error in the court's rulings in that behalf, for the reason that they either misstate the law, fail to properly define the law as applicable to the subject-matter of the instruction, or assume facts within the exclusive province of the jury, or instructions given included the substance of those refused.

As to the instructions refused, a number were offered upon the question of contributory negligence, but

we do not think the court committed any error in exclud ing them, for the reasons already given. A number of the instructions refused also related to the question of assumed risk. There was no error committed in this. It is clear from the evidence that the injury was not caused by any of the risks which the deceased assumed.

While we recognize the well-settled rule that an employee assumes all risks which are ordinarily and naturally incident to the particular service in which he engages, it does not in any sense relieve the employer from the duty of using reasonable care in furnishing competent servants, reasonably safe machinery and appliances, and a reasonably safe place in which his employees are required to work, as well as using reasonable care to prevent injuries to his employees.

Some of the refused instructions in terms instructed the jury as to whether or not the defendant, by himself or his employees, gave notice or warning to the deceased just prior to starting the elevator. The subject-matter of such instructions was fully and fairly included within the terms of instruction numbered 4, given by the court, which reads as follows:

"The court instructs the jury that if they find, by a preponderance of the evidence, that the deceased, Henry Gitzen, was, at the time of, or immediately prior to, the happening of the injuries complained of, occupying a position on the roof of the cage of the elevator owned and operated by defendant, and that the defendant then knew of the presence of the said Henry Gitzen upon such elevator, and that at such time the defendant entered said elevator and requested or ordered the employee in charge thereof to take him to a higher floor, and that in consequence of such order or request said employee set the elevator in motion, without the defendant or said elevator employee first giving warning, or causing warn-

ing to be given, to the said Henry Gitzen, so notifying him of his intention to start the elevator, and by reason thereof, the said Henry Gitzen lost his footing on the roof of said elevator and was knocked or thrown down therefrom, in such wise to inflict injuries causing his death, then and in such event you will find the issues herein joined for the plaintiff and against the defendant."

The instructions given by the court, taken together, fairly presented to the jury the law applicable to the evidence disclosed by the record, and substantially included all phases of the case which were proper subjects for instruction.

We discover no reason disclosed by the record, justifying a reversal of the judgment. The same will be affirmed.

Decided March 10, A. D. 1913. Rehearing denied May 12, A. D. 1913.

[No. 3487.]

EMPIRE RANCH & CATTLE COMPANY v. FARMER.

PLEADING—*What Must Be Specially Pleaded.* In an action of ejectment defendant pleads a prior decree quieting his title, but fails to show that the title then in question was identical with that presented in the ejectment suit. Reply, a general denial, not assailing the judgments so pleaded. Plaintiff may produce the judgment roll showing that the decree was void.

The court below having improperly vacated the prior judgment, its judgment was modified, following *Empire Co. v. Lumelius, post.*

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for the appellant.

Mr. J. F. MAIL, for the appellee.

MORGAN, J.

Appeal from a judgment in favor of plaintiff for possession of three quarter-sections of land that had been sold for taxes. All of the assignments of error herein have been determined heretofore against appellant's contention, with, possibly, one exception, particularly, by two cases in which the opinions have just been written: *Empire Ranch & Cattle Co. v. Lumelius* (No. 3488), *post,* 49, 131 Pac., 796, and *Empire Ranch & Cattle Co. v. Howell* (No. 3562), *post,* 67, 131 Pac., 798. In this case, the defendant pleaded in its answer four decrees of a county court, quieting the defendant's title in the property involved herein, that were offered in evidence, two of which were excluded because not accompanied by the judgment roll, and two admitted without objection. Appellant contends that, as two of these decrees were admitted without objection, were pleaded in the answer, and were not attacked in the replication, except by general denial, they should stand as evidence of title, and that the court erred in admitting evidence attacking them, and in setting them aside in its judgment.

The contention is that, the decree in each instance being pleaded, and valid on its face, the plaintiff could not, under the general denial in the replication, introduce any proof of defects in the proceedings prior to its entry. This necessarily contemplates a technical question of pleading not decided in the Lumelius case, and, so far as the investigation has been extended, in any other case decided by the supreme court or the court of appeals of this state.

We have decided, in the Lumelius case, citing *Terry v. Gibson,* 23 Colo. App., 273, 128 Pac., 1127, that it was not error to exclude such decrees from the evidence when not accompanied by the judgment roll; and that a district

court may decree that a judgment of a county court is void, even on collateral attack, if it affirmatively appears from the judgment roll that the county court judgment is void for want of jurisdiction, citing *Empire Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522.

We have decided, in the Howell case, in reference to a tax deed, citing *Harrison v. Hodges,* 49 Colo., 105, 111 Pac., 706, that where it is not pleaded in the answer in an action of this character, the plaintiff may introduce evidence, even under a general denial in the replication, showing defects in the proceedings prior to its execution. The same rule will apply to a judgment or decree when it is offered as evidence of estoppel, or of title.

Consequently, the question presented is—was the evidence proving the invalidity of the two admitted decrees admissible under the general denial in the replication? The answer must be in the negative, under strict rules of pleading, but, applying the same strict rule, the answer should specifically plead a decree so that it may be identified, and show that the *title of the parties* in issue in the decree pleaded is the same title in issue in the pending case.—2 Freeman on Judgments, §461.

The title may have been the same, but neither the answer nor the decrees themselves disclose it, and, under these conditions, it was not reversible error to permit the plaintiff to prove, under the general denial in his replication, by introducing the judgment roll, that the decrees were void. A reversal and another trial would result in the same judgment. Furthermore, a mere failure of plaintiff to interpose an objection to the admission of the decrees (without the judgment roll, which would have excluded them or required the roll to be produced by the defendant) ought not to preclude the plaintiff from producing the roll, himself, even under a general denial. The technical "pound of flesh" seems to be demanded on

both sides, but this court is pleased to find itself bound to disregard such demands, under the more persuasive influence of §84, Code 1908, which provides:

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

We are not disposed, however, to say that it was not error to hold them for naught and set them aside in this action at law, but will only say that the judgment of the lower court should be modified, in accordance herewith, as to all of said decrees, as directed in the case of *Empire Ranch & Cattle Co. v. Lumelius, supra,* appealed from the same court. This does not conflict with any former opinions of this or the supreme court holding that tax deeds may be set aside under similar pleadings, because, in reference to such deeds, the courts are controlled by the peculiar provisions of §5733 Rev. St. 1908.—*Empire Ranch & Cattle Co. v. Howell,* 23 Colo. App., 265, 129 Pac., 247; *Rustin v. M. M. & T. Co.,* 23 Colo., 358, 47 Pac., 302. Furthermore, in all cases brought to recover land sold for taxes, founded upon the code action of possession, and recently decided by this court, including the present case, the parties have either stipulated that the taxes and interest should be returned as provided in §5733, *supra,* and thus brought the cases within the scope of said section, or else the case has been tried without objection as to the pleadings, and in all respects the same as if the proceedings had been a suit in equity or to quiet title. No error is found concerning the setting aside of the tax deeds on this appeal, and the questions involved concerning the same have been heretofore determined by recent decisions of this court.

The judgment is affirmed.

[No. 3488.]

EMPIRE RANCH & CATTLE CO. v. LUMELIUS.

1. JUDGMENT—*Record as Evidence.* Where a judgment is relied upon as an estoppel, or as an adjudication of facts, not only the judgment entry, but the judgment roll, must be produced.

2. PLEADING—*What Must Be Specially Pleaded.* It is error to vacate, as void, a judgment valid upon its face, not referred to in the pleadings, and the judgment roll of which is not produced.

Where plaintiff desires to set aside a tax deed, or a decree of court, the better practice is to assail it in the complaint, or in the reply if it is pleaded in the answer.

3. TAX DEED—*Amended Deed—Construction.* A tax deed was excluded as void upon its face, because showing a sale to the county, and an assignment of the certificate made by the county clerk after the lapse of more than three years from the date of the sale. A second deed, issued upon the same sale, failed to show either the date of the assignment or what officer made it, but did show that it was authorized by the county commissioners during the same month appearing in the first deed. Held, that the two deeds were to be taken together, and that the latter deed was properly excluded.

4. APPEALS—*Judgment.* The judgment of the district court in an action of ejectment vacated and set aside a decree of the county court, valid upon its face, quieting title in defendant, which was not mentioned in the pleadings, and this, without the production of the judgment roll. On appeal this judgment was modified and limited to a statement that the decree was without effect as to the plaintiff's title.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

MORGAN, J.

Appeal from a judgment for the recovery of a quarter-section of land that had been sold for taxes. Appellant contends that the judgment was erroneous wherein it set aside a judgment and decree of the county court, and a tax deed offered in evidence, but excluded, because

the county court decree was not supported by an offer of the judgment roll, and the tax deed was void on its face. This contention is not without merit, as the complaint was for the possession of land under the code, and the answer a general denial. However, it appears in the record that, as to the tax deed, aforesaid, and two other tax deeds, also set aside, a stipulation was made, in reference to these deeds and the contents of the decree, that, "the treasurer might compute the taxes and interest and render a statement thereof, and the amount so stated should be inserted in the judgment," thus bringing the action, under the decisions of this and the supreme court, within the scope and purview of an action for the recovery of land sold for taxes under §5733, Rev. Stat. 1908.—*Empire Ranch & Cattle Co. v. Howell,* 23 Colo. App., 265, 129 Pac., 247; *Rustin v. M. M. & T. Co.,* 23 Colo., 358, 47 Pac., 300. The stipulation shows a desire to have the taxes, paid by defendant, returned, and premises the concession that the deeds under which they were paid might be set aside and cancelled, as done by this court in the first case above cited.

As to the decree of the county court, it was not error to exclude it, under the ruling of this court in the case of *Terry v. Gibson,* 23 Colo. App., 273, 128 Pac., 1127, wherein a similar judgment was excluded and set aside under almost identical circumstances, and the judgment affirmed. In that case Cunningham, Judge, citing numerous authorities, said:

"The true rule with reference to the admission of a document of this sort is that for the purpose of proving the existence and contents of the judgment or the mere rendition of it, the record thereof, or an authenticated copy of it, is sufficient without producing the remainder of the record; but when the record of a judgment is offered as an estoppel, or, when as in this case, it is

offered as an adjudication of certain facts, it must be accompanied by the judgment roll."

In the later case, also, of *Empire Ranch & Cattle Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522, the same conclusion was reached. However, the error particularly complained of, on this appeal, is that the judgment of the lower court set the decree of the county court aside and held it for naught, because it was void, although it was not referred to in the pleadings, was valid on its face, and the judgment roll was not introduced to show its invalidity. That the lower court was in error in this particular has been determined by this court in the case above cited, *Empire Ranch & Cattle Co. v. Coleman,* wherein the court, by King, Judge, said:

"There is no doubt as to the right of the district court to hold a county court decree void on a collateral attack, provided it affirmatively appears from the judgment roll that the judgment was void for want of jurisdiction in the county court.—*Empire Ranch & Cattle Co. v. Coldren,* 51 Colo., 115, 117 Pac., 1005. But we think that where, as in the instant case, the decree of the county court, regular on its face, containing recitals which, if true, would give the court jurisdiction to pronounce the decree, is rejected when offered as evidence of title and as an estoppel, for the sole reason that the judgment roll was not offered to support it—in other words, the decree is excluded for want of competent and sufficient evidence to show that the court had jurisdiction of the parties, instead of for the reason that an affirmative showing has been made that the court had not jurisdiction to render the decree—the court was without authority to adjudge the decree null and void, and the judgment should have been limited to holding the said decree of no force or effect as against the plaintiff's title.

A decree that is not affirmatively shown to be void should not, upon a collateral attack, be so adjudged."

This is particularly true where, as in this and the Coleman case, the complaint was the code action for possession and the answer was a general denial. The judgment of the court should, therefore, be modified and limited to a statement therein, that the decree of the county court has no force or effect as against the plaintiff's title. The better pleading in all such cases, when the plaintiff desires to have tax deeds and decrees of courts set aside, is to attack them in the complaint, or, when pleaded in the answer, to attack them in the replication.

All other assignments, concerning the tax deeds relied upon by defendant and offered or admitted under its general denial, have been heretofore determined against the appellants, with the possible exception of the deed admitted without objection, dated and recorded June 26, 1908, in Book 44, page 21, of Yuma County records. This deed was not recognized in the judgment; however, appellant contends that it was absolute proof of title in the defendant, because it was admitted without objection, and fair on its face, and that plaintiff could not introduce proof of its latent infirmities, under the general denial of the replication. An examination of the record discloses that no evidence was introduced attacking it, but it appears to have been issued upon the same sale as the first deed, offered and excluded as void on its face, because the certificate was assigned by the county clerk more than three years after the sale, and must have been in the nature of a correction deed. It does not disclose what officer of the county assigned the certificate, nor when it was assigned, but it does disclose that the assignment was authorized by the board of county commissioners, "on ——— day of Apr., 1901," the same

month, with the day omitted, that appears in the first deed, aforesaid. This brings the deed within the rule announced in *Empire Ranch & Cattle Co. v. Neikirk,* 23 Colo. App., 392, 128 Pac., 468, 470, wherein this court said:

"But, inasmuch as the original tax deed recites that the assignment was made by the county clerk, and the correction deed does not negative that statement, the defendant having offered both deeds in evidence, it must be assumed that the recitations of the first tax deed with reference to the assignment spoke the truth, and defendant is bound thereby. The clerk has no authority to assign a certificate after three years from its date. *Lambert v. Scott,* 53 Colo., 357, 127 Pac., 142."

Therefore, as modified, the judgment is affirmed.

[No. 3497.]

MEYER v. WRIGHT.

1. APPEALS—*Abstract.* Where the abstract fails to set forth the evidence heard below the judgment of the trial court will be accepted as conclusive upon the facts.

2. CORPORATIONS—*Stockholder Dealing With.* A stockholder may, acting in good faith, deal with the corporation in respect to its property or liabilities as may any stranger.

3. CONTRACTS—*Validity—Public Policy.* The properties of a corporation had been sold for taxes. A stockholder, who was also the attorney of the other stockholders, entered into a contract with the holder of the certificate to purchase it, the holder agreeing to assign the certificate upon payment of a certain sum of money. *Held,* that no presumption of fraud or intended misconduct on the part of the stockholder was to be indulged, and that the contract was, upon its face, above reproach. A decree for specific performance was affirmed.

4. PLEADINGS—*Demurrer.* A demurrer admits all facts which are well pleaded.

Appeal from Eagle District Court. HON. CHARLES CAVENDER, Judge.

Mr. HENRY R. RHONE, for appellant.

Mr. JOHN A. EWING, Mr. FRAZER ARNOLD, for appellee.

HURLBUT, J., delivered the opinion of the court.

May 28, 1908, plaintiff (appellee) instituted suit against defendant (appellant) in Eagle district court. The complaint, among other things, alleged that on June 10, 1907, the Gold Belt Mining, Milling & Prospecting Company of Council Bluffs, Iowa, a corporation, was the owner of certain patented claims, machinery and improvements therein described; that the taxes upon said premises were delinquent for the year 1900, and the property had been sold by the treasurer of Eagle County on the 17th day of October, 1901, for such delinquent taxes; that at the tax sale defendant purchased said property and received a treasurer's certificate therefor; that on June 10, 1907, plaintiff was interested in the property as a stockholder, and as attorney for the stockholders of said mining company, and on that day entered into a written contract with defendant, under the terms of which defendant agreed to obtain a treasurer's deed for the premises in pursuance of his certificate of sale, and thereupon convey the said property to plaintiff; and that in consideration of such conveyance plaintiff agreed to pay defendant the full amount of taxes with interest and penalties and all other expenses incurred by defendant in obtaining said deed. The contract provided for an alternative consideration to be paid by plaintiff at his option, not necessary to consider. The contract contained an acknowledgment by defendant of the receipt of $10 from plaintiff as part payment of the consideration. The complaint further alleges that on August 2, 1907, it was found and determined that a balance of $397.75 was due defendant under the terms of said con-

tract, which sum, on the 7th day of August, 1907, plaintiff paid to defendant, which he received and retained; that on October 27th, 1907, defendant received from the treasurer of said county the tax deed for the premises described; that defendant had paid all subsequent taxes and had done all things necessary and requisite to entitle him to the tax deed aforesaid; that plaintiff complied with, and performed, all the terms of said contract on his part to be complied with and performed; that defendant refused to convey to plaintiff the said property and his interest therein acquired by virtue of the tax deed; closing with a prayer for specific performance of the contract and general relief.

To this complaint a demurrer was interposed by defendant, containing two grounds: First, that the complaint did not state facts sufficient to constitute a cause of action; second, "that the contract set out in said complaint is illegal and void, contrary to public policy, contrary to good morals, and cannot be enforced."

The demurrer was afterwards heard by the court and overruled, whereupon defendant elected to stand on his demurrer, saved proper exceptions to the court's ruling, and took the case, by appeal, to the supreme court. The case is now before us for determination by lawful transfer from the supreme court.

As we interpret the demurrer, only one ground recognized by the code is therein stated, to-wit, the first. The alleged second ground does not state any one of the seven reasons for demurrer found in §50, Mills' Annotated Code. The matters, however, contained in this second ground could probably be urged in support of the first. The record shows that after defendant elected to stand on his demurrer, evidence was introduced on behalf of plaintiff to sustain the allegations of the complaint, but such evidence does not appear in the abstract

of record. The decree, however, appears therein and is conclusive as to its finding of facts.

But one question is before the court, a determination of which is decisive of this appeal: Did the complaint state facts sufficient to constitute a cause of action?

Appellant contends that the contract of June 10, 1907, set out in the complaint, is illegal, void on its face, and contrary to public policy and good morals, and that other averments of the complaint confirm such contention. The averments alluded to read as follows:

"That prior to the said 10th day of June, 1907, the plaintiff herein being interested as a stockholder and as the attorney for the stockholders of said mining company, began negotiations with the defendant with a view of purchasing said tax sale certificates and the rights of the defendant, R. J. Meyer, therein or thereto and to acquiring the title to said property under the tax deed to be issued by the treasurer of Eagle County under said tax sale certificate or certificates and to acquire such title under said tax deed as could be acquired under and by virtue of such sale thereof for the taxes of the year 1900."

In view of these allegations appellant reasons that a stockholder or stockholder's attorney sustains a trust relation toward the company, and cannot purchase its property at a tax sale, either in the name of the stockholder or the attorney; that the same is prohibited under a well-known rule of equity; that one occupying a fiduciary relation towards his principal may not purchase the property of the principal without his consent, nor otherwise deal with the same to his own advantage and profit. We fail to see wherein this rule is applicable in this case. A mere stockholder, unlike a director, is under no duty to serve his corporation. In the absence of fraud he may deal with it or its debts or property as any

stranger. He does not occupy a trust relation towards the other stockholders, and he may deal with them or with the corporation in good faith. It is not alleged that plaintiff was the attorney for the company, but even if such were the case there is no averment from which the inference can be drawn that he acted fraudulently or prejudicial to the rights of the company in executing the contract in question. The contract set out in the complaint is free from ambiguity. It requires defendant to obtain a treasurer's deed for the property described in the complaint, and as soon as such deed is obtained convey such property to plaintiff. It requires plaintiff to pay defendant certain sums of money to be used for the purposes stated. The complaint shows that plaintiff made all payments required of him, and otherwise complied with all the terms of the contract, while, on the contrary, defendant secured the tax deed but refused to make the conveyance as he had agreed to do. As we read the complaint, not a line or word therein shows, or tends to show, violation of any trust by plaintiff, nor does it show any act or thing done or said by him which suggests bad faith or moral turpitude on his part. Everything said or done by him, as shown by the complaint, appears to be entirely consistent with honesty and good morals. True, the complaint shows that plaintiff, while a stockholder and attorney for other stockholders, contracted with the holder of the tax sale certificate to secure title from him by deed to the company's property previously sold at tax sale. It cannot be successfully contended that this fact by itself justifies a legal presumption of fraud. For anything that appears to the contrary in the complaint, the entire transaction may have been conducted with the full knowledge of plaintiff's clients or brother stockholders. It is not disclosed by the complaint that any client of plaintiff, the

company itself, or any stockholder thereof, is complaining of the contract or plaintiff's relation thereto. We do not think the authority or reasoning found in appellant's brief are applicable to the issues presented on this appeal. The demurrer admits all the facts well pleaded in the complaint, and we are satisfied it states a good cause of action. The judgment is affirmed.

[No. 3538.]

ROSENBAUM ET AL. v. McEWEN.

1. PLEADING—*Answer After Demurrer Overruled.* The defendant, answering after demurrer overruled for ambiguity or uncertainty, waives these causes of demurrer.*

2. APPEALS—*Abstract.* Failure to set forth the proceedings on the demurrer in the abstract, and appellant's announcement in the abstract that the failure is based on the ground that he does not urge demurrer on appeal, waive defendant's right to a hearing thereon in this court for ambiguity or uncertainty.*

3. —— *Cross Errors.* A judgment in favor of the appellee will not be increased where he fails to assign cross error.

4. PLEADING—*Aider by Pleading Over.* Material omissions in the complaint may be supplied by the answer.

5. *Referee—Findings of,* supported by the record are controlling.

6. ACCOUNT STATED—*Essentials of.* To an account stated, two things are necessary, (1) that there be an examination by each party of the claims of each party, (2) that there be a mutual agreement as to the respective claims, and as to the balance arrived at.

7. —— *Assailing.* What is alleged as a stated account may be assailed by a bill in equity, or disputed and overthrown, when asserted in an action at law or in equity.

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*Syllabus by BELL, J.

Appeal from Larimer District Court. HON. HARRY P. GAMBLE, Judge.

Mr. T. J. LEFTWICH, for appellant.

Messrs. RHODES & TEMPLE, for appellee.

BELL, J.

The complaint avers, among other things, that on August 10th, 1906, the plaintiff and defendants associated themselves for the purpose of buying, selling, feeding and disposing of cattle, each of the parties sharing equally in the expenses and profits; that in pursuance of this agreement $29,056.02 worth of cattle were purchased; that the plaintiff contributed from his own funds, for said purchase, $2,125.07 and that the balance of said purchase price was paid from the proceeds of certain joint notes executed by each and all of the parties to this action; that the expense of feeding, handling and disposing of said cattle was $11,920.83, all of which was paid in cash by the plaintiff, and that both of the above specified sums were paid from his own private resources; that said cattle were sold for $48,683.28, resulting in a net profit of $7,706.43; and that all the returns that plaintiff has received from said firm or the defendants is $5,315.80; that there is owing to the plaintiff from the defendants the sum of $11,298.91 which they have refused and neglected to pay, though often requested so to do.

The plaintiff demands judgment for $11,298.91 or such other sum as the court may find on final accounting to be due from the defendants, and prays that the defendants be required to answer, under oath, setting forth any other, further or different accounts, which they may have relating to the said business, for interest, cost and general relief.

The defendants demurred to the complaint because, they allege, it did not state facts sufficient to constitute a cause of action, and because ambiguous, unintelligible and uncertain, stating divers alleged ambiguities, etc.

The court overruled the demurrer and the defendants filed a joint answer and cross-complaint denying most of the allegations in the complaint; and alleged that on August 1st, 1907, all the parties hereto met and settled all of their unfinished partnership business, except 26 head of unsold cattle, and then and there stated all of their accounts up to August 1st, 1907, excluding said 26 head of unsold cattle, and then and there found that the defendants owed the plaintiff the sum of $1,175.50, which they then and there paid in full settlement, relinquishment, accord, satisfaction and discharge of any and all claims owned, held or asserted by the plaintiff against defendants, or against said association; and that the plaintiff then and there executed and delivered to defendants his said relinquishment or release in writing therefor. And that thereafter, on or about the 1st day of September, 1907, the plaintiff and defendants entered into a subsequent settlement of the affairs of said association, including said 26 head of unsold cattle, fixtures and appliances upon their feeding lots; and then and there mutually stated, between themselves, an account of all matters accruing subsequent to the date of the earlier settlement, and, as a result of said mutual statements of accounts of said association, and of the mutual accounts of the members thereof, and after deducting all credits due to the said plaintiff, it was then and there ascertained and agreed that there was due from the plaintiff to defendants the sum of $236.00, which the plaintiff then and there agreed to pay, but failed so to do and the defendants pray judgment, against the plaintiff, in the cross-complaint for the sum of $236.00.

The plaintiff filed a replication denying all accounts stated, final settlements in part or whole, all acquittances, whether in writing or verbal, and other new matter in the answer and cross-complaint; and alleges that if de-

fendants have any such release or discharge in writing purporting to be a settlement, that the same has been obtained fraudulently, is without consideration, and is not the act of the plaintiff.

The parties, by consent, joined the court in the appointment of Winton M. Ault, Esq., an attorney of the Larimer County bar, as referee to take the testimony, make findings of fact and conclusions of law, and recommend to the court a proper judgment.

The referee took the evidence in full on all material issues raised by the pleadings, and reported specific findings of fact and conclusions of law, and recommended a judgment in favor of the plaintiff and against the defendants for the sum of $1,642.16. The court approved the findings and rendered judgment thereon for the amount recommended by the referee, from which findings and judgment the defendants appealed.

The appellants have materially limited the scope of our consideration in reviewing this record by abandoning many of their former positions.

At folios 68-69 the abstract reads as follows:

"Demurrer filed in district court, Larimer County, April 7th, 1908.

"(Note—As demurrer is not urged it is not set forth in the abstract.)"

As we understand, the appellants' failure to present an abstract of the record of the proceedings on the demurrer and their express waiver set forth in the abstract, deprive the appellants of the right to a hearing on the demurrer in this court, for ambiguity, uncertainty, etc.—*Roberts et al. v. Handasyde,* 21 Colo. App., 450, 122 Pac., 60.

Appellants' counsel, at page 7 of brief, asserts "the principal points discussed in this brief are that the complaint fails to state a cause of action," and then proceeds

to point out four alleged material omissions from the complaint, viz.: That the complaint fails to state whether an accounting had been taken or attempted before suit brought; that there were no charges of fraud in any of the prior dealings of the parties, nor does complaint seek to invalidate any act by reason of fraud; that complaint does not show whether a dissolution had taken place; or whether there was any firm indebtedness.

If we should feel disposed to consider the demurrer or the sufficiency of the complaint, notwithstanding the waivers above set forth, then we should feel compelled to hold that the allegations in the answer and cross-complaint supplied the material omissions in the complaint.—*Thalheimer v. Crow et al.,* 13 Colo., 397, 400, 22 Pac., 779; *Barth v. Deuel,* 11 Colo., 494, 19 Pac., 471; *Horner v. Bramwell,* 23 Colo., 238, 243, 47 Pac., 462; *McConathy v. Deck,* 34 Colo., 232, 82 Pac., 702.

Counsel for appellants states, at page 7 of brief, that:

"Appellants will not in this court discuss the amount of the award or judgment, or the method adopted by the referee in reaching it. Insofar as the judgment is itself concerned, only such errors will be relied on as would, in the judgment of the appellants, vitiate any judgment at all whatever its amount."

After disposing of the sufficiency of the complaint, appellants claim that there were complete accountings and settlement of the firm business alleged in the answer and established by the overwhelming weight of the evidence; and that "the further findings and determination, in effect at least, that the settlement was tainted with fraud is supported by neither pleadings nor proof—that a solemn settlement, evidenced in writing, signed by the parties affected, cannot be attacked or invalidated with-

out proper pleadings, and by proof of a character that arises above mere conjecture and inference."

We understand that the trial court did not question the efficiency of the pleadings setting up the stated accounts, acquittances, accord and satisfaction, or releases; but the referee finds in Number 24 "that there was never had, by and between the parties to this action, any mutual settlement of accounts of this co-partnership." The referee further states, in the latter part of Number 24, regarding exhibits D, E and F, which purport to be written acknowledgments of plaintiff of settlements as charged in the answer: "I examined the instruments and am convinced that the signatures are those of the plaintiff, and I therefore consider them as competent evidence. I do not, however, consider them as conclusive evidence of a settlement between the parties. After carefully weighing the evidence, I have come to the conclusion that there was no mutual settlement between the parties hereto for a number of reasons, a few of which are as follows: That the plaintiff is 79 years old, uneducated and incapable of entering into a settlement of accounts of the magnitude of this enterprise. Again, a large part of the papers such as the notes, expense drafts drawn by the defendants, vouchers, etc., were not present at the alleged settlement. About all the papers present were the checks and some papers of the plaintiff and a few sale bills and a statement from the McKee books written in Hebrew, furnished by the defendants. Having seen the plaintiff on the stand, I do not believe he understood the nature of the instruments he signed."

The record strongly supports the conclusions of the referee, and we must be governed by his findings.—*Johnson v. Johnson,* 18 Colo. App., 493, 72 Pac., 604; *Perdew v. Creditors, etc.,* 11 Colo. App., 157-159, 52 Pac., 747; *United Water Works Co. v. Farmers Loan & Trust Co.,*

11 Colo. App., 225, 230, 53 Pac., 511; *X. Y. Irrigating Ditch Co. v. Buffalo Creek Irrigating Co.,* 9 Colo. App., 438-441, 49 Pac., 264; *L. P. C. M. Co. v. L. C. C. M. Co.,* 11 Colo., 223, 225-9, 17 Pac., 760, 7 Am. St. Rep., 226.

The general requirements of an account stated are first, that there be a mutual examination of the claims of each other by the parties; second, that there be a mutual agreement between them as to the correctness of the allowance and disallowance of the respective claims, and of the balance as it is struck. If the evidence shows, however, that either of the parties did not understand that there had been a final adjustment of their respective demands between them, the courts are not to decree an adjustment between them contrary to their own understanding in the matter.—*Clark v. Marbourg,* 33 Kan., 471, 6 Pac., 548-551; *Lockwood v. Thorn,* 18 N. Y., 285.

This court, in *C. F. & I. Co. v. Chappell,* 12 Colo. App., 385-392, 55 Pac., 606, 609, said:

"We think counsel attach undue solemnity to accounts stated. It is only *prima facie* evidence of its own correctness, and while a party may, if he finds it oppressive, institute an original proceeding in equity to be relieved from it, yet, when it is interposed as a defense to an action either at law or in equity, it may be disputed and overthrown in the same suit. Whenever it is thrust forward, in whatever form of action it is pleaded, it may be impeached."

The settlements were set up as new matter in the second, third and fourth further defenses of the appellants, and denied in replication of appellee. This court agrees with the referee and trial court that no mutual settlement of the accounts of the partnership transactions was proven.

The referee expressed himself as impressed with the idea that the appellee was entitled to even more credits than he gave him; but says that the appellee could not

positively distinguish his partnership checks from his private checks, and therefore some of the checks which he believed were partnership checks, or given for partnership purposes, were excluded, and that a credit of $4,000.00 was given to the appellants for which they could not account other than by their own statements that this amount was expended for the co-partnership.

Under the report and findings of the referee, judgment of the court and the record before us, we cannot say that substantial justice has been done to the appellee; but, as he did not file cross-errors, we cannot increase the judgment.

We do not find that any injustice has been done to the appellants, and therefore the judgment should be and is hereby affirmed.

[No. 3541.]

NATIONAL CONSTRUCTION COMPANY v. OWENS.

1. CONTRACT—*Modification—Effect.* The modification of a contract as to the prices to be paid for different items of the work contracted for, made by mutual consent, does not make a new contract.

2. APPEALS—*Findings of the Court Below,* will not be disturbed unless the appellant affirmatively shows prejudicial error.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. ROBERT COLLIER, Mr. T. WEBSTER HOYT, for appellant.

Mr. JAMES J. MCFEELEY, for appellee.

CUNNINGHAM, Presiding Judge.

On March 26, 1908, plaintiff filed his complaint in the district court to recover damages for the violation

of a contract or agreement whereby he was to perform for the defendant certain work in and about the construction of man-holes and flushers, which constituted, or were to constitute, a part of a sanitary sewer system in the city of Denver. After having completed a portion of the work covered by the contract, plaintiff ceased working. He avers that the defendant violated the agreement, while the defendant claims that the plaintiff, without cause, ceased work, and became thereby responsible for the breaking of the contract. Certain modifications as to prices for different items of work were made by mutual consent of the parties, after the plaintiff had entered upon the work, but we think these modifications did not constitute a new contract, as appellant contends.

Plaintiff alleges that at the time the contract was broken by the defendant there remained work to be performed under the contract upon which he would have made a clear profit, had he been permitted to complete the same, of $1,500. This is denied by the defendant.

The jury, upon conflicting evidence, found that the plaintiff was entitled to recover $739.50, and judgment for that amount was entered in favor of plaintiff. The evidence adduced by the plaintiff to support his damages is not in all respects clear and satisfying, but an examination of the entire evidence discloses sufficient grounds to support the judgment. After hearing all the evidence, and the motion for a new trial, the trial judge evidently took this view of the matter, and we cannot say that he was not warranted in so doing.

The supreme court of West Virginia, commenting upon the duty of appellate courts, when reviewing a judgment based upon conflicting testimony, uses this language:

"If, after the most careful scrutiny, the conflicting testimony leaves the case in such a pivotal condition that it is a matter of doubt as to which side ought to prevail,

it becoming a mere matter of conjecture, this court will not disturb the determination of the lower court, in obedience to another well-established rule, that the burden is on the appellant to affirmatively show error to his prejudice."—*Ward v. Ward,* 43 W. Va., 1-10, 26 S. E., 542, 546.

Judgment Affirmed.

[No. 3562.]

EMPIRE RANCH & CATTLE CO. v. HOWELL.

1. TRUST DEED—*Recitals of Trustee's Deed,* are *prima facie* evidence of what is so recited.

2. LIMITATIONS—*Payment of Taxes.* A tax deed asserted as color of title was recorded April 22, 1891. Held, that the first payment of taxes to be counted, in support of a plea of the statute of limitations (Rev. Stat., sec. 4090), was that made in 1902 for the tax of 1901. The action having been commenced less than seven years subsequent to such payment, the plea of the statute was not sustained.

3. PLEADING—*What Must Be Specially Pleaded.* Where, in an action for possession of lands, defendant relies upon a tax deed as evidence, not having pleaded it, the plaintiff may, by the production of the record of the tax sale, show fatal defects in the proceeding, without pleading such defects in the reply.

What is said to the contrary in *Empire Co. v. Howell,* 23 Colo. App., 386, 128 Pac., 474, is to be limited to cases where a tax deed, valid upon its face, has been sufficiently pleaded.

4. APPEALS—*Harmless Error.* To receive affirmative evidence of the invalidity of a deed which is void upon its face is not prejudicial error.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

MORGAN, J.

Appeal from a judgment for possession of a quarter-section of land. Appellant's contention, that the recitals in a trustee's deed introduced as part of plaintiff's chain of title are not *prima facie* evidence of the facts therein recited, has been determined against such contention in the recent case between the same parties, 23 Colo. App., 348, 129 Pac., 521, affirming a case between the same parties, 22 Colo. App., 389, 125 Pac., 593. The only other assignment of error discussed in appellant's brief necessary to be considered is that the lower court erred in holding that the proof made by the defendant in support of its plea of the seven years statute of limitations, §4090, Rev. Stat. 1908, was insufficient to support the plea. The defendant claimed color of title by reason of a tax deed, void upon its face, for reasons given in several cases recently decided between the same parties by this court. The deed was admitted as proof of color of title. The proof, chronologically stated, was that the taxes for 1900 were paid by the defendant April 2, 1901, and annually thereafter, including the taxes of 1907, paid in 1908; the tax deed was dated April 10, and recorded April 22, 1901. The first payment of taxes that can be counted under this statute was made in 1902, for the taxes of 1901. The action was commenced December 29, 1908, less than seven years after the first payment. In the case between the same parties, 22 Colo. App., 584, 599, 126 Pac., 1096, on rehearing, this court, through Cunningham, Judge; said:

"Taxes that have been assessed and which are due and payable at the time the color of title is taken cannot thereafter be paid and counted as one of the seven payments required by the statute, and that seven full years must elapse between the first payment of taxes on vacant and unoccupied land and the institution of the suit to recover the land," followed and cited in *Marks v. Morris,*

54 Colo., 186, 129 Pac., 828. It appears that seven full years did not intervene between the first payment of taxes duly and timely made after the recording of the deed, and the commencement of the action, under the foregoing decisions; hence, the facts did not sustain the plea.

Although not necessary to determine this appeal, another assignment will be considered, whereby appellant contends that, under a general denial in the replication, a plaintiff, in the code action for possession of land, cannot introduce evidence attacking a tax deed, introduced by defendant, for defects not appearing on the face thereof. This contention is not without merit, where the defendant pleads a tax deed, fair on its face, to establish title in himself.—*Anderson v. Bartels,* 7 Colo., 256, 3 Pac., 225; *Schlageter v. Goode,* 30 Colo., 310, 70 Pac., 428; *Harrison v. Hodges,* 49 Colo., 105, 111 Pac., 706. In the last case cited, however, the supreme court held that, in the code action to quiet title, it is impossible to conceive how a defendant can plead the infirmities in a tax deed that is not pleaded by the plaintiff; and it would seem that, in the code action for possession of land, it would be no less impossible to conceive how a plaintiff could be expected to plead in a replication the defects leading up to the execution of a tax deed relied upon by defendant, where the defendant has not pleaded it in the answer. Insofar as it may have been intimated in the opinion in the case of *Empire Ranch & Cattle Co. v. Howell,* 23 Colo. App., 386, 128 Pac., 474, 475—that the plaintiff in that case could not introduce proof of the defects in the proceedings leading up to the issuance of the tax deed, fair on its face, relied upon by defendant—the court was led into error by the mistaken impression, no doubt, that the defendant had pleaded such a tax deed, without realizing that the answer of the defendant was a general denial only. The opinion in that case

should be limited to instances where a tax deed, valid on its face, has been sufficiently pleaded.

In the pending case, the defendant pleaded, in one of its defenses, a tax deed which was rejected when offered in evidence, because void on its face; and the appellant contends that it was reversible error to permit the introduction of further evidence to prove the invalidity of said deed. This might have been unnecessary, but not reversible, matter. As the deed was void on its face, it was properly excluded. It was insufficient upon which to base the statute of limitations pleaded in the fourth defense, §5733, Rev. Stat. 1908, and, as hereinbefore stated, it was insufficient upon which to base the plea of the seven years statute of limitations, on account of the lack of the necessary period of seven years between the first payment of taxes and the commencement of the action.

Judgment Affirmed.

[No. 3581.]

LOUGEE ET AL. V. WILSON.

1. QUIETING TITLE—*Plaintiff's Title—Evidence—Trustee's Deed—Recitations.* A deed of trust described the trustee as the Nebraska Loan & Trust Co. A deed purporting to be executed by the same company, in pursuance of the sale under the powers of the trust deed, declared in the attestation clause that the grantor had caused "its corporate seal to be attached," and the certificate of acknowledgment, appended thereto, stated that the Nebraska Loan & Trust Co., by, etc., "second vice-president, personally known to me to be the person and officer who executed," etc., acknowledged the same as "the act and deed of said corporation." Held sufficient, *prima facie*, to put the defendant to proof of his title, though no evidence was given of the incorporation of the Nebraska company, its powers, or its compliance with the statutes of this state.

Plaintiff is only required to show possession, or, in case of vacant lands, such title as upon its face confers constructive possession.

2. —— *Defendant's Title.* It is the defendant and not the plaintiff who must stand or fall upon his own title.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellants.

Mr. CHALKLEY A. WILSON, Mr. ASHER B. WILSON, for appellee.

MORGAN, J.

Appeal from a decree in favor of the plaintiff, and setting aside a tax deed, in an action under the code to quiet title to one-half of a quarter-section of vacant and unoccupied land.

The contention is that, as the plaintiff introduced a deed of trust (the grantor in which, it was stipulated, was the patentee), and the trustee's deed following the same, as proof of title, it was necessary for him to prove that the trustee, The Nebraska Loan & Trust Company, was a corporation, that it was authorized to hold and convey the title, as trustee, and, also, that it had complied with the laws of this state necessary to enable it to do so. The trustee's deed, in addition to the suggestive name of the trustee, and the corporate seal, contained a statement that, "The Nebraska Loan & Trust Company has caused this instrument to be subscribed by its second vice-president, and its corporate seal to be attached," and the acknowledgment stated that before the notary "came The Nebraska Loan & Trust Company by W. F. Buchanan, second vice-president, personally known to me to be the identical person and officer who executed the foregoing deed, and he acknowledged the execution of the same to be his voluntary act and deed and the voluntary act and deed of said corporation." This was sufficient *prima facie* proof, in an action to quiet title, to require the defendant, whose plea was title in himself, to prove it. The authorities relied upon by appellant are upon actions in ejectment, or trespass and damages. The de-

fendant introduced a tax deed, void on its face, to sustain his title, which was excluded, but afterwards admitted as color of title.

An examination of some of the authorities as to the order and the nature of the proof in actions to quiet title under the code will determine that plaintiff's proof was sufficient.

Pomeroy, in his work on Code Remedies, says:

"In this position the possessor of the land, without waiting for any proceedings, legal or equitable, to be instituted *against* him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, assert their title, and have the controversy put to rest in a single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment."—Pomeroy's Code Remedies (4th Ed.), §266.

It necessarily follows that it is the defendant, in this case, and not the plaintiff, who must stand or fall upon his own title. In *Wall v. Magnes,* 17 Colo., 476, 480, 30 Pac., 56, 58, the court, quoting from 129 U. S., 291, 9 S. C. Rep., 293, 32 L. Ed., 688, said:

"An allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer or to allegation and proof of the estate or interest which he claims."

In the case of *Lambert v. Shumway,* 36 Colo., 350, 85 Pac., 89, in an action to quiet title, wherein the defendant, in the second defense, pleaded a tax deed, the court said:

"The second defense failing, the denial of plaintiff's possession in the first defense is not sufficient to put plaintiff upon proof touching the same."

In the case of *Empire Co. v. Bender,* 49 Colo., 522, 113 Pac., 494, in an action to quiet title, wherein the defendant pleaded a tax deed, and the land was vacant and

unoccupied, the court found the tax deed void on its face, and the court said:

"The moment defendant's adverse title failed, as it did when it offered in support of it a tax deed void on its face, it had no further interest in the cause, and could raise no other issue. * * * It is only because of his adverse interest that a defendant is permitted to question a plaintiff's rights at all."

In the case of *Foster v. Clark,* 21 Colo. App., 192, 121 Pac., 130, in an action to quiet title, wherein defendant pleaded four void tax deeds, this court said:

"Appellant's claim of title, as we have seen, was based upon tax deeds, which, if they had been valid, would have vested in him a title paramount and adverse to the title claimed by appellees and their privies. Hence, the validity or invalidity of the trust deeds would have been a matter of no importance, had his tax deeds been valid."

In the case of *Inman v. White,* 21 Colo. App., 427, 122 Pac., 65, in an action to quiet title, wherein the defendant claimed under a tax deed and a judgment, and objected to plaintiff's proof of title, this court said:

"This could have in no way availed the defendant, for he had no claim upon which title to himself could have been based, and therefore no interest in the regularity or validity of the foreclosure proceedings under which plaintiff claimed. The judgment of foreclosure, the sale, and the subsequent deed, are *prima facie* valid and regular; therefore the defendant has no such interest as justifies the court in questioning the regularity of such proceedings."—*Craft v. Merrill,* 14 N. Y., 456; *Webster v. Kautz,* 22 Colo. App., 111, 123 Pac., 140; *Empire Co. v. Lanning,* 53 Colo., 151, 124 Pac., 579.

It may be deduced from the foregoing authorities, that in the code action to quiet title, if the defendant has denied the allegations of the complaint, and pleaded an

adverse title, valid on its face, the plaintiff, to sustain the issues, must produce sufficient proof, only, to show possession, or in case of vacant and unoccupied land, a title sufficient on the face thereof to show constructive possession; thereafter the burden is upon the defendant to prove title as in ejectment, or in the code action for possession and damages, and, failing to prove a valid title, judgment would follow for the plaintiff, as defendant would be in no position to attack the proof.

Furthermore, the reference to the trustee as a corporation in the trustee's deed and acknowledgment, the corporate seal thereupon, together with the rulings in the following cases that non-compliance with our statute is a matter of defense where the foreign corporation sues in our courts, discloses, quite clearly, that plaintiff's proof was sufficient.—*Holmes v. Bank,* 23 Colo., 210, 47 Pac., 289; *Ill. S. M. Co. v. Harrison,* 43 Colo., 362, 96 Pac., 177; *Herman Bros. Co. v. Nasiacas,* 46 Colo., 208, 103 Pac., 301.

All other assignments of error have been resolved against the appellant by former decisions of this court and of the supreme court, upon identical conditions.

The judgment is therefore affirmed.

Affirmed.

[No. 3582.]

PUZZLE MINING & REDUCTION CO. v. MORSE BROS. MACHINERY & SUPPLY CO.

1. SALE—*Secret Reservation of Title.* Where, in the sale of chattels, possession is delivered to the vendee, a secret reservation of the title to the vendor is void as against creditors of the vendee, or subsequent purchasers from him without notice. The transaction is, in law, an absolute sale.

2. —— *Sale of Machinery to Lessee.* One who sells mining machinery to the lessee of mining property is under duty to inform himself of the terms of the lease. Failing so to do, he is affected by a provision of the lease that additions made by the lessee become parcel of the realty.

3. FIXTURES—*Part of the Realty.* A boiler erected in a mill for the reduction of gold bearing ores, by a lessee thereof, held in place by stone casings laid up in mortar and cement, shafting attached by bolts to the frame of the mill, and tables resting upon a foundation and connected therewith by bolts, and which are necessary to the successful operation of the plant, or some parts thereof, and were put in place with the intention to make them a permanent accession to the freehold, are part of the realty.

Appeal from Summit District Court. HON. CHARLES CAVENDER, Judge.

Mr. CHARLES F. CARNINE, for appellant.

Messrs. ELLIOTT & BARDWELL, for appellee.

CUNNINGHAM, Presiding Judge.

January 30, 1908, appellee (hereinafter referred to for convenience as the Machinery Company) instituted a replevin suit against the Gold Dust Consolidated Mining Company (hereinafter referred to as the Gold Dust Company) to recover possession of certain mining machinery which the Machinery Company had theretofore sold to the Gold Dust Company, and on which a balance remained due. The Machinery Company insists that the sale was a conditional one, and the title was not to pass from it to the Gold Dust Company until the machinery had been paid for. There were two sales and two written contracts of sale, in all respects alike, in which it was specifically provided that "the entire title and ownership of the machinery should remain in the machinery company and vendor until the full payment of all installments due thereon, together with interest." And it was further stipulated in said written contracts between the Machinery Company and the Gold Dust Company, vendor

and vendee, "that the latter received the property as bailee of the former." The Gold Dust Company was in possession of certain placer mining property as lessee, the title to the property being in the Puzzle Mining & Reduction Company, appellant here, said company being hereinafter referred to as the Puzzle Company. The machinery in question was purchased for and installed upon this property. The pertinent portions of the lease under which the Gold Dust Company was operating the mine required it "to take possession of the mill then on the property; to add to and install therein such machinery and appliances as might be necessary in the treatment of the ore from the mine, and to increase the capacity of said mill to at least sixty tons daily." Incorporated in the lease was an option which permitted the Gold Dust Company, under certain conditions, to become the purchaser of the mining property covered by the lease. In connection with this option agreement appears the following:

"It is further understood and agreed that in case of the forfeiture of the said lease, the payments made thereunder shall be considered as rental for said property up to the time of such forfeiture, and that all machinery and appliances installed in, and all improvements made upon said property shall revert to the first parties hereto." (The first parties being the Puzzle Company.)

It will be seen that one of the considerations for the lease and option agreement was the purchase and installation by the lessee, the Gold Dust Company, of such machinery and appliances as might be necessary for the treatment of the ore, said purchase and installation of machinery to be in addition to the machinery on the property at the time the lessee and prospective purchaser, the Gold Dust Company, took possession thereof. This is an important fact which must be borne in mind. It may, we think, be fairly inferred that the machinery

here involved was purchased by the Gold Dust Company of the Machinery Company, and added to the plant already upon the property, in fulfillment of that requirement of the lease and option to which we have just directed attention.

Aside from certain objections which it filed to the replevin bond, the Gold Dust Company made no appearance whatever in the case. On February 3, 1908, appellant, the Puzzle Company, filed its petition in intervention, and thereafter the contest was solely between the intervenor and the Machinery Company. For the purpose of preventing the Machinery Company from removing the machinery from the mine, the Puzzle Company instituted injunction proceedings, which were, as we view the record, but auxiliary to the replevin proceeding, and designed simply to maintain the *statu quo*. We shall therefore make no reference to the injunction feature of the case, further than to say that it was disposed of on the trial at the same time the issues raised in the replevin suit were heard, the two cases being consolidated by stipulation. The case was tried to the court without a jury, the trial judge finding that there was due the Machinery Company from the Gold Dust Company $1,085.14. By the decree the intervenor, the Puzzle Company, was given thirty days in which to pay this amount to the Machinery Company, and in case payment of this sum was not made by the Puzzle Company within the time specified, the right of possession of the machinery was awarded to the Machinery Company.

The Puzzle Company defended upon two distinct theories, the first being that the sale was, under the authorities of this state, an absolute one, and that the attempt on the part of the Machinery Company to reserve a secret lien should not be upheld. Its second defense was based upon the contention that the mining machinery had become so affixed to the realty as to be-

come a part thereof, hence could not be recovered in a replevin suit, in any event, nor at all as against the intervenor, which had in the meantime declared a forfeiture of the lease and re-entered into possession of the mining property. It will thus be perceived that two difficult questions are presented for our determination.

1. The authorities pertaining to conditional sales are far from harmonious; the rule pertaining to fixtures, and when personal property loses its identity as such and becomes merged in the real estate to which it is attached, is made to depend largely upon the facts of each particular case.—*Hardware Co. v. McCarthy,* 10 Colo. App., 220, 50 Pac., 744. The first question has been repeatedly before the courts of this state for consideration. See *George v. Tufts,* 5 Colo., 165; *Weber v. Diebold,* 2 Colo. App., 68, 29 Pac., 747; *Tufts v. Beech,* 8 Colo. App., 35, 44 Pac., 771; *First Congregational Church v. Grand Rapids Co.,* 15 Colo. App., 46, 60 Pac., 948; *Andrews v. Colo. Savings Bank,* 20 Colo., 313, 36 Pac., 902, 46 Am. St. R., 291; *Jones v. Clark,* 20 Colo., 353, 38 Pac., 371; *Clark v. Bright,* 30 Colo., 199, 69 Pac., 506; *Coors v. Reagan,* 44 Colo., 126, 96 Pac., 966.

It is not necessary that we should analyze these cases, or quote at length from them. Suffice it to say that, contrary to the ruling in many, perhaps the majority of the states, the doctrine in Colorado has become well established that a conditional sale reserving a secret lien to the vendor is void as against creditors or subsequent holders having no notice thereof, and who are injuriously affected thereby. Mr. Justice Maxwell, in the Coors case, *supra,* quotes the following with approval from the Weber case, *supra:*

"Appellee, having vested Wood with the possession and all *indicia* of ownership, it was not a bailment, but a sale subject to defeasance upon a subsequent condition, an arrangement known only to the parties themselves.

A party who, by his own acts, places another in the ostensible position of owner, should be estopped to deny such ownership. Private transactions of this character are not favored, and they are opposed to public policy."

In other words, such conditional sales as against third parties having no notice thereof, and who are injuriously affected thereby, must be treated as absolute sales. Hence, so far as the Puzzle Company is concerned, the sale of the machinery in the instant case must be treated as absolute.

There are additional reasons appearing in the contracts of sale entered into between the Machinery Company and the Gold Dust Company why these sales must be regarded as absolute, so far, at least, as the Puzzle Company is concerned, under the rule in *Andrews v. Colorado Savings Bank, supra*, viz.: a promissory note was given by the Gold Dust Company, the vendee, to the Machinery Company, the vendor, for the balance due, and the agreements further provided that:

"Said party of the second part, the vendee, agrees that they will promptly pay to the party of the first part the purchase price for said property, when and as the same shall become due and payable as aforesaid."

In the *Andrews* case, Mr. Justice Goddard, speaking for the court, says:

"Notwithstanding the agreement itself provides that the title to the seating shall remain in Andrews & Co. until such payment in cash shall have been made therefor, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, that such an intention is rebutted by the terms and stipulations in the notes given in pursuance of the agreement; they being absolute obligations, making the purchaser unconditionally liable for the purchase price. The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the

conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the property delivered, however characterized by the parties, is essentially and in legal effect an absolute, and not a conditional sale."

Inasmuch as the lease from the Puzzle Company to the Gold Dust Company required the latter to purchase and install, by way of addition to the plant, other mining machinery necessary to the proper operation of the mine, such requirement being one of the considerations moving from the lessee to the lessor, in the purchase and installment of the machinery here involved the Gold Dust Company, the lessee, was but carrying out one of the conditions of the lease and option. The consideration having been in a sense paid to the lessor (who is not shown to have had knowledge of the secret lien) by the lessee when it installed the machinery in question, this consideration cannot now be recovered by the Machinery Company from the lessor, in virtue of a secret lien incident to a so-called conditional sale. The harshness of this rule is more apparent than real, since the records of the county wherein the mining property is located afforded notice to the Machinery Company at the time it sold the machinery to the lessee that the record title of the mining property was in the Puzzle Company. While the lease in question appears not to have been recorded, yet the Machinery Company could have easily ascertained what the provisions of the lease were; at least there is nothing in the record to indicate any difficulty which it would have encountered in this behalf. No great hardship is perceived in a rule which requires the vendor of mining machinery to obtain from the owner of the record title of mining property on which the machinery he sells is to be installed and used, consent to the reser-

vation of a vendor's lien before delivering such machinery to a purchasing lessee.

2. The machinery sold by the Machinery Company to the Gold Dust Company, and which is involved in this controversy, consisted of the following articles: One 35 H. P. boiler, 180 H. P. boiler, 2 Frue-Vanners, 4 iron pulleys, 1 wood pulley, and 4 No. 5 Wilfrey tables. We have followed the language used in the abstract in describing these articles of machinery. As we understand the terms, the Frue-Vanners and the Wilfrey or Wilfley tables are all used for the same purpose, and constitute heavy mining machinery. The testimony concerning the installation of this machinery shows that the boilers were held in place by stone casings laid up in mortar and cement, and were connected with the balance of the mill by proper piping. The shafting was attached by bolts to the timber or framework of the mill. The tables were framed in a foundation resting upon the earthwork of the mill, and all the tables being connected to the shafting by bolts. The machinist who helped install this machinery was asked the following questions, and gave the following answers:

"Q. Describe to the court the manner in which the tables are installed. A. We put them down the way we usually do to make them stay. Q. Describe more in detail. A. In that we made an extra foundation and set them on, made a good solid foundation, and they were fastened down solid. They fasten the Wilfley table down with a lag screw to this foundation made especially for that. That is about all that was necessary to do. Q. Tell the manner in which it (the 80 H. P. boiler) was installed. A. It's put in in a stone wall as we usually install boilers of that kind, and connected to the engine. Both boilers are connected. Q. What would be necessary, Mr. Gilbert, in order to remove the 80 H. P. boiler you refer to? A. Disconnect the engine. * * * Q. What else would

be necessary in order to remove the 80 H. P. boiler from the mill besides disconnecting it from the engine? A. Just simply a lot of work. Q. What effect would it have, if any, on the stone or cement casing? A. We would tear that all down."

Under the ruling in this jurisdiction these fixtures become a part of the realty.—*Roseville Co. v. Iowa Co.,* 15 Colo., 29, 24 Pac., 920, 27 Am. St. R., 373; *Hardware Co. v. McCarthy,* 10 Colo. App., 200-219, 50 Pac., 744; *Mosca Town Co. v. Wellington,* 39 Colo., 326, 89 Pac., 783, 121 Am. St. R., 175; *Gibson Co. v. McNichols,* 51 Colo., 59, 116 Pac., 1041.

The facts in the last case cited, and the Roseville case in the 15th Colorado, are strikingly similar to the facts here under consideration, both as to the character of the property and the manner of its installation. In *Hardware Co. v. McCarthy, supra,* it is said:

"Now it is not absolutely necessary that in order to constitute a fixture, so as to take an article from without the line of personal property, it should be permanently affixed to the freehold by physical attachment. This may or may not be the case. * * * The controlling questions now, in determining as to a large class of articles whether they partake of a real or a personal character, are the intention of the party to make a permanent accession to the freehold, and the use to which the article is to be applied. (Citing cases.) If it constitutes a part of a plant of machinery necessary to the successful operation of the whole, or if its use is essential to the operation of some part of the machinery, which is physically attached to the freehold, then it may in many cases be properly termed a fixture, even though it wholly lacks a permanent physical attachment to the realty."

The record in this case we think clearly shows, not only that the articles of machinery here in controversy were necessary to the successful operation of the whole

plant, or at least to the operation of some part of the machinery, but it further shows, with reasonable clearness, that it was the intention of the party who installed the machinery to make a permanent accession to the freehold and to use these articles of machinery for the sole purpose of the development and operation of the mine on which they were installed. Moreover, they appear to have been attached to the freehold with this particular purpose in view. To hold that this machinery did not become a part of the real estate upon which it was installed would be to fly in the face of an unbroken line of adjudications from the two appellate courts of this state.

The judgment of the district court is reversed.

[No. 3585.]

EMPIRE RANCH & CATTLE CO. v. WILSON.

QUIETING TITLE—*Void Deed—May Be Annulled.* In an action under Mills' Code, sec. 255 (Rev. Code, sec. 274), the plaintiff prevailing may have a decree annulling a deed under which his adversary claims, even though the instrument is void upon its face.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. CHALKLEY A. WILSON, Mr. ASHER B. WILSON, for appellee.

MORGAN, J.

The pleadings and the facts involved herein are similar to those in the case of *Lougee et al. v. Wilson,* No. 3581, just decided, and the opinion in that case determines this appeal. However, appellant interposes herein

one contention not advanced on that appeal—that the plaintiff ought not to be permitted to invoke the authority of a court of equity to quiet his title as to a deed which he alleges is void on its face. Our code provides that:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."—§255, Mills Ann. Code.

Under this code provision a plaintiff may, as Mr. Pomeroy says, "compel his adversaries to come into court and assert their title." If a defendant's claim so asserted should be void on its face, the judgment may quiet plaintiff's title as to such claim, and it is not necessary that the judgment should set aside the instrument upon which the claim is based or remove the cloud, if any, created thereby. A decree in such an action is sufficient if it states that the plaintiff's title is quieted as to such instrument, without further recitals.

This court and the supreme court, however, in many recently adjudicated cases, have recognized the right of a plaintiff, under this code provision, to set aside a tax deed, void on its face, although in those cases this question may not have been directly considered.—*Empire R. & C. Co. v. Coldren,* 51 Colo., 115, 117 Pac., 1005; *Munson v. Keim,* 53 Colo., 576, 127 Pac., 1026; *Inman v. White,* 21 Colo. App., 427, 122 Pac., 65; *Kit Carson Co. v. Rosenberry,* 21 Colo. App., 439, 122 Pac., 72; *Terry v. Gibson,* 23 Colo. App., 273, 128 Pac., 1127.

All of the authorities relied upon by the appellant involve actions in equity to remove a cloud wherein it became the duty of the plaintiff to allege in his complaint, in many instances, the nature and kind of instrument that constituted the cloud. Those cases are not directly applicable here, notwithstanding it has been held that

our code action to quiet title is but a recognition of the old chancery proceeding of a similar nature.—*Wall v. Magnes,* 17 Colo., 476, 30 Pac., 56. It has never been held that the pleadings and the practice under the suit in equity to remove a cloud are the same as in this action.

Under this code provision, however, the cancellation of an instrument, or the setting aside of a deed, is an incident to the relief granted, rather than the primary object and purpose of the action. The purpose of the action is to quiet a plaintiff's title as to adverse claims made by certain persons against whom the action is commenced, to require them to come into court and plead the title upon which their claims are based; and, although the plaintiff, in a replication, alleges that such claims are void on the face thereof, and although the court may conclude, after an examination, that such allegation is true, such fact does not prevent the plaintiff from obtaining the relief sought, although the effect is to set aside a void deed, as the very object of the action is to have the validity of such claims determined.

Appellant says its void tax deed did not cast any cloud on plaintiff's title, and therefore it should not be "dragged into a court of equity" to have a cloud removed that is no cloud. This might be true, under many authorities, if its claims were as noiseless as its title, and if this had been a direct suit in equity to remove such a cloudless cloud as defendant would have its deed considered; but this action is the code action to quiet the title as to defendant's adverse claims, and to render them as void and harmless as the basis thereof. Therein lies the efficiency of this code provision, and the extent of the remedy provided. This remedy in equity has been greatly extended by statute.—Pomeroy's Code Remedies, §266.

Judgment Affirmed.

[No. 3592.]

HILL v. SULLIVAN.

1. APPEALS—*Abstract.* Where the charge of the court is not set out in the abstract, it will be assumed that the jury were properly instructed.

2. TRIAL—*Conduct of Judge Presiding.* The judge presiding in a litigated cause should exercise great caution and self-restraint in the exercise of his authority.

In an action for negligence, in which, at the end of a trial occupying two days the plaintiff recovered a verdict, the judge presiding, on the first day of the trial, called before him two witnesses who had been examined for the defense, denounced them as wilful perjurers and ordered them to give bail to answer to that charge. The jury had been excused, but this proceeding was had in the presence of the parties, their counsel, and all connected with the cause, and an account of it was published in one of the newspapers of the city on the same evening. The evidence of negligence was vague and unsatisfactory. The defense gave no satisfactory explanation of the circumstances shown in the testimony for the plaintiff. Considering that the drastic action of his honor must have had the effect not only to terrorize the witnesses in question, but to overawe other witnesses whom the defendant might have desired to call, and that thereby the defendant might have suffered prejudice, the judgment was reversed, and a new trial awarded.

Appeal from Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

Mr. JOHN T. BOTTOM, for appellant.

Mr. R. D. REES, for appellee.

CUNNINGHAM, Presiding Judge.

On April 4th, 1908, appellee, while walking on the sidewalk on the easterly side of Eighteenth Street, between California and Stout streets, in the city of Denver, between two and three o'clock in the afternoon, caught her foot in an upturned corner of a woven wire mat lying upon the sidewalk in front of the Lewiston Hotel, which was at the time under lease to and being operated by appellant. As a result of the plaintiff's tripping upon

the mat, she was thrown to the sidewalk and sustained serious bodily injury not necessary to be described. The corner of the mat was upturned to the extent of about two inches. The mat was about twenty-two inches in width by thirty inches in length. Plaintiff was wholly unaware of the existence of the mat upon the sidewalk. The jury returned a verdict in favor of plaintiff in the sum of $600, upon which judgment was entered, after motion for new trial had been overruled, and the defendant brings the case here on appeal.

No exceptions were preserved to the instructions, nor are the same set forth in the abstract. It must be assumed, therefore, that both the question of negligence and contributory negligence, which were plead by the defendant, were submitted to the jury under proper instructions.

Each member of the court has given to the record in this case, which is short, much more than the ordinary consideration, because of our unwillingness to disturb the judgments of trial courts. The evidence of negligence in this case is meager in the extreme. There is nothing in the record to indicate, or from which an inference can be drawn, who was responsible for removing the mat from within the hotel, where it belonged, to the place where it was, upon the sidewalk, unless the doctrine of *res ipsa loquitur* is invoked, and this doctrine can be applied only upon the theory that because the mat was the property of the hotel company, and under its exclusive control, and belonged within the hotel, and was found without the hotel on the walk, its presence in an improper place, under such circumstances, called for an explanation from the defendant; and she, having failed to make any explanation satisfactory to the jury, their finding of negligence was warranted. There was some vague testimony given by one of the employes of the hotel to the effect that baggagemen sometimes, in remov-

ing trunks from the hotel, dragged this mat out upon the sidewalk, but that the mat reached the sidewalk on the day of the accident in this manner the witness did not pretend to say. There was no evidence whatever to indicate how long the mat had been upon the sidewalk prior to the time when plaintiff tripped upon it and received her injuries. The members of the court are not in accord as to whether or not the doctrine of *res ipsa loquitur* can be invoked by the plaintiff in this case, but in view of a certain incident that occurred during the progress of the trial, to which we shall presently advert, it is the unanimous opinion of the court that the judgment ought to be reversed and the cause remanded for re-trial.

The case was called for trial on June 10th, and was continued through the 11th, at least, as the verdict was not returned into court until June 12th. On the first day of the trial, and a considerable length of time before the taking of testimony had been concluded (the record showing some fifty-four folios of testimony taken after the incident to which we are about to allude) the trial judge excused the jury, and called two witnesses of the defendant before the bar of the court, and told them that he believed they had committed deliberate and wilful perjury, and ordered them to be placed under bond in the sum of $1,000 to await the action of the district attorney. We are unable to discover anything in the testimony of the two witnesses that would warrant so drastic an action on the part of the trial judge. The effect of the judge's severe arraignment of the witnesses, and his placing them under arrest or bond, would naturally tend to overawe any other witnesses which the defendant might have desired later to call, and could have had no other effect than to terrorize the two witnesses in question, whose further testimony might well have been highly advantageous to the defendant at a later stage of the case.

The jury, it is true, was excused at the time of the occurrence we are considering, but it occurred in open court, apparently in the presence of the litigants and their counsel and, so far as the record discloses, in the presence of everyone connected in any way with the trial save the jury. As we have already stated, this transaction occurred during the first day of the trial, and the record discloses that one of the evening papers published in the city of Denver on that day contained an account thereof.

We are loath to criticize the conduct of trial judges, for we recognize that their duties are arduous, and of necessity they are often called upon to hastily determine and summarily perform them. But their very great power and their tremendous influence upon the results of a trial call for extreme caution and great self-restraint, to the end that this power and influence be so exercised as to protect, rather than endanger, the rights of litigants who appear in their courts. Where witnesses of one of the parties to a suit are promptly, upon leaving the stand, and in the midst of the trial, called by the trial judge to the bar of the court and publicly denounced as perjurers, and placed under arrest, it seems probable that the rights of such party would be thereby prejudiced.

In view of the unsatisfactory character of the evidence given in this case on the question of defendant's negligence, it is the more probable that the conduct of the trial judge, to which we have called attention, prejudiced her rights.

For the reasons given above the judgment is reversed, and the cause remanded for a new trial.

Reversed and Remanded.

Decided April 14, A. D. 1913. Rehearing denied May 12, A. D. 1913.

[No. 3594.]

LOUGEE ET AL. v. WILSON.

QUIETING TITLE—*Limitation—Laches.* No statute limits the time within which the action may be instituted; nor is laches available as a defense.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellants.

Mr. CHALKLEY A. WILSON, Mr. ASHER B. WILSON, for appellee.

MORGAN, J.

This appeal is from a judgment for plaintiff in an action to quiet title, and is fully determined by the opinion in the two cases just decided, *Lougee et al. v. Wilson* (No. 3581), *ante,* 70, 131 Pac., 777, and *Empire Co. v. Wilson* (No. 3585), *ante,* 83, 131 Pac., 779. However, appellant on this appeal urges with extreme vigor the defense of *laches* denied by the lower court. The plaintiff in this action must be in possession, or have sufficient title to give constructive possession; there is no statute limiting the time within which the action may be commenced; the very nature of the remedy presupposes an impregnable position; it is only to allay the clamor of adverse claimants, force them into court to assert their claims and have them determined and the plaintiff's title quieted that the remedy is provided. His delay, therefore, can only be measured by his forbearance as to the annoyance of adverse claimants who "fear their fate too much" to begin an action themselves, and if the doctrine of *laches* is applicable in such action at all, it affects the defendant rather than the plaintiff.—*Coffee v. Emigh,* 15 Colo., 184.

191, 25 Pac., 83, 10 L. R. A., 125; *Nichols v. McIntosh*, 19 Colo., 22, 28, 34 Pac., 278; *Terry v. Gibson*, 23 Colo. App., 273, 128 Pac., 1127.

Judgment Affirmed.

[No. 3599.]

BLOOMFIELD v. NEVITT.

1. APPEALS—*Verdict on Conflicting Evidence*, is conclusive.

2. MISTAKE OF LAW—*Third Person Not Liable for Moneys Expended in Pursuing Such Mistake.* A stenographer assuming that an attorney has implied authority from his client to order the preparation of a bill of exceptions brings an action against the client for his services in the matter and suffers defeat. The attorney, not having asserted any such authority, is not responsible to the stenographer for moneys expended by him in the litigation against the client.

Appeal from Rio Grande District Court. HON. CHARLES A. PIKE, Judge.

Mr. JESSE STEPHENSON, Mr. JAMES P. VEERCAMP, for appellant.

Mr. CHARLES M. CORLETT, Mr. JOHN NEVITT, for appellee.

CUNNINGHAM, Presiding Judge.

John Nevitt, the appellee, was the official reporter of the district court of Rio Grande County, and other counties of the twelfth judicial district. In this capacity he reported the proceedings of a certain trial in Saguache County. Thereafter he made a bill of exceptions, including all of the testimony taken on the trial. This service was performed, as he alleges, at the instance and request of the appellant, Bloomfield, who was the principal attorney for the losing parties, Emil and Frances Tobler. The Toblers declined to pay Nevitt's bill, or any part

thereof, contending that they had not authorized their attorney to have the testimony extended and did not desire to appeal from the judgment which had been rendered against them. Thereupon Nevitt brought suit against the Toblers, and obtained a judgment for $450 (with interest), which was the amount plaintiff was justly entitled to charge for his services under the prevailing prices for such work. The Toblers appealed the case to the supreme court, where the judgment was reversed. This case is reported in 45 Colo., 231, 100 Pac., 416, 23 L. R. A. (N. S.), 702, 132 Am. St. R., 142, 16 Ann Cas., 925. A careful statement of facts involved in that case was made by Mr. Justice Campbell, and by reference we adopt so much thereof as may be applicable to the case before us. Following the decision in the supreme court, and on May 25, 1909, Nevitt filed suit in the district court of Rio Grande County against Bloomfield, to recover the amount claimed for his services, with interest thereon, together with the additional sum of $309.72, which represents the amount which he (Nevitt) laid out and expended in the prosecution of his suit against the Toblers. The jury returned a verdict in favor of Nevitt for $957, which includes accrued interest upon the original claim, though this fact is not clearly deducible from the abstract filed. We discover no complaint made in brief of defendant on the grounds of the excessiveness of the verdict, other than the general claim of non-liability on the part of defendant for any sum whatever. From this judgment Bloomfield, the defendant, brings this cause here on appeal.

1. Appellant denies that he ever ordered, directed or instructed Nevitt to make the bill of exceptions. His sole defense is predicated upon this single contention. The testimony upon this point is conceded by counsel for appellant to be in sharp conflict. From the verdict of the jury it is manifest that on this issue of fact they found against appellant, and we are concluded by that

finding. The supreme court, on the trial of the Tobler case, held that Bloomfield had no authority whatever to order the bill of exceptions. Indeed, in the instant case Bloomfield makes no contention that he had such authority, but as we have already pointed out, predicates his entire defense upon a flat denial that he gave any instructions to Nevitt to make the bill of exceptions. All argument, therefore (and there is much of it in the briefs), pertaining to agency and innocent mistake on the part of the agent as to his authority, has no application.

The jury having found that appellant directed the appellee to make the bill of exceptions, and there being no dispute as to the value of the work, the liability of the appellant to the appellee, in the circumstances of the case as just stated, follows as a natural consequence. We have, therefore, no difficulty in reaching the conclusion that the appellant should pay the appellee for the service which he (the appellee) rendered; the former's liability to the latter in the sum of at least $450, with interest thereon from the date that the amount became due, seems clear.

2. The liability of the defendant, Bloomfield, for the costs incurred by Nevitt in the prosecution of his suit against the Toblers presents a more difficult question. On this point the record discloses, without any serious conflict, that Bloomfield never made any specific or direct representation to Nevitt that he had authority to bind his clients for the work which the jury found he had directed Nevitt to do. Nevitt appears to have assumed, from the fact that Bloomfield was the leading counsel for the Toblers, and from that fact alone, that his (Bloomfield's) order for the bill of exceptions bound his clients; and upon this erroneous assumption brought suit against the Toblers and incurred expenses amounting to something over $300, in the unsuccessful prosecu-

tion thereof. On this point the supreme court, in *Tobler v. Nevitt, supra,* says:

"There is no evidence in this case of the ratification of or acquiescence in such employment of plaintiff by defendant in this action. The cause having been tried by plaintiff's counsel upon the theory, which the court adopted by so instructing the jury, that the special retainer of Bloomfield to try the case in the district court necessarily carried with it the implied power, without any special authority from his clients, to perfect an appeal and represent his clients therein, and to bind them to pay all the costs and expenses necessarily incurred in the prosecution of such review, his judgment cannot stand."

From this it will be seen that Nevitt's prosecution of his case against the Toblers was the result of a mistaken conception of the law of agency, and not from any mistaken view of the facts for which Bloomfield was at all responsible. Indeed, the record in this case discloses that Nevitt knew, before he instituted the former suit against the Toblers, that they denied all liability on his claim, and denied that they had authorized Bloomfield to order the bill of exceptions, or that they had any intention of appealing the case. Bloomfield himself practically told Nevitt, before the latter instituted his suit against the Toblers, that he had no such authority, for he (Nevitt) testified that when he asked General Bloomfield about whether he was authorized to order the work done, all that he (Bloomfield) said was, "Sometimes attorneys take a great deal of authority." We therefore are in accord with the statement of Mr. Justice Campbell which we have already quoted, to the effect that Nevitt prosecuted his case against the Toblers upon a mistaken theory that the special retainer of Bloomfield to try the case in the district court necessarily carried with it the implied power, without any special authority from his

clients, to perfect the appeal and contract the debt for the bill of exceptions. Bloomfield may not be held responsible for the results which Nevitt's ignorance of the law occasioned himself. We are therefore of opinion that the trial court erred in submitting to the jury the question of Bloomfield's liability to Nevitt for the latter's expenses incident to the unsuccessful prosecution of his suit against the Toblers.

For this error the judgment of the trial court must be modified, with instructions to enter a judgment in favor of appellee and against appellant for $450, with interest thereon at the rate of eight per cent per annum from May 2, 1904 (which is the date from which the appellee in the former suit reckoned interest, and which appears without contradiction to be a somewhat later date than the completion of his work on the bill of exceptions), to the date of the entry of judgment, and for the costs of this suit.

Judgment modified, and case remanded with directions.

MORGAN, J., dissents.

[No. 3603.]

CASTRILLA ET AL. V. VELOTTA ET AL.

1. SPECIFIC PERFORMANCE—*Conditional Tender of Payment.* Vendee of lands who, in tendering payment of the agreed price, demands a conveyance not warranted by the agreement of purchase is not entitled to specific performance.

2. LANDLORD AND TENANT—*Option to Tenant to Purchase.* Lessee of lands, with an option of purchase, tenders payment of the stipulated purchase money, with a condition as to the terms of the deed not warranted by the provisions of the option. He is not entitled to retain possession beyond the period of his lease.

3. APPEALS—*Appellant Must Show Error.* Where, upon the whole record, no error to the prejudice of the appellant is made to appear, the judgment will be affirmed.

Appeal from Chaffee District Court. HON. LEE CHAMPION, Judge.

Mr. GEORGE D. WILLIAMS, for appellants.

Mr. JOHN A. PERRY, of counsel.

No appearance for appellees.

CUNNINGHAM, Presiding Judge.

On the first day of August, 1904, the appellants, as lessees, entered into an agreement with the appellees, who were the owners of a tract of farming land consisting of about one hundred twenty-five acres, whereby the appellants agreed to lease said land for three years, at an agreed price of one hundred fifty dollars per year. Incorporated in this agreement was an option permitting the lessees to purchase the land at the expiration of their lease on terms and conditions in said agreement set forth. The controversy arises over the different construction placed upon a certain clause in the agreement pertaining to water rights.

At or before the expiration of the lease the appellants signified their desire and intention to exercise their option of purchase, and tendered the first payment in accordance with the provisions of the option, demanding, however, that certain water rights should be specifically set forth in the deed of conveyance. The appellees, placing a different construction upon the option purchase than that contended for by the appellants, declined to make the deed, and after much unavailing effort to reach some basis of settlement, appellees, on February 1, 1909, filed their complaint in the district court for the recovery of the possession of the land which appellants continued to hold after the expiration of the lease, and for $1,500

damages. By the terms of the leasehold provisions of the agreement, the rights of the appellants thereunder expired January 1st, 1908. The trial occurred August, 1909. Nothing was paid by the appellants for the use of the land after the expiration of the leasehold. The defendants answered admitting the leasing provisions of the agreement, and by way of cross-complaint asked for the specific performance of the option agreement. They also asked for damages in the sum of $1,000 for loss of crops, which they alleged was due to the failure on the part of appellees to furnish during the leasing period the amount of water which they alleged they were entitled to use under the agreement. All of the parties to this action are Italian, as were many of their witnesses. They spoke our language indifferently, certain of the witnesses speaking through an interpreter, thereby more or less affecting, in point of clearness, the testimony given. The contract on which the rights of all of the parties depend was written in Italian, and the translations introduced add appreciably to the difficulty of a clear understanding thereof.

1. As we have said, the whole difference between the parties arises over the construction of that feature of the lease and option agreement pertaining to water rights which the appellants would be entitled to use during the time they operated the land as lessees, and which they would be entitled to a conveyance of in the event of purchase. The following is all that appears in the agreement that in any wise refers to the water right. We quote from one of the translations which appellants set forth in their brief, and with which, apparently, they are satisfied:

"The Velotta formally bind themselves to furnish to Castrilla and Capra all the spring water coming from the farm in where they are actually settled, viz., the water commonly called 'seepage water', and this outside

of the one that they have actually the right. During the term of the rental any and all trouble that may be caused by the fault of Castrilla and Capra will fall over them and at any time that the Velotta will be in need of the seepage water they have a right to use the same."

It appears from the record, although there is nothing specific in the written agreement of the lease and option so indicating, that there was other water belonging to the land leased, which, under the intention and understanding of the parties, appellants would be entitled to use, and to receive a conveyance for if they purchased, besides the so-called "seepage" or spring water, but as there was no controversy over these last named water rights, further reference to them is unnecessary.

It will be seen from what we have quoted from the written agreement, that the quantity of seepage or spring water which appellees were to furnish appellants is extremely uncertain, and quite incapable of ascertainment. There is nothing whatever in the record which discloses with anything even approaching definiteness how much of this seepage or spring water appellees needed, or for what portion of time they used it, and the controversy was limited to this seepage water right. Appellants were unwilling to accept a deed to the land unless this particular water right was therein specifically and unqualifiedly conveyed. The following questions propounded to and answers made by Castrilla (who seemed to represent and speak for both appellants) while he was on the stand, indicates with reasonable clearness his attitude at the time he made the tender and demanded a deed. He was testifying through an interpreter which explains the use, at times, of the pronouns in the third person.

"Q. But were you willing that Mike [referring to

one of the appellees] should reserve the first right to the use of the seepage water to himself?

A. He might use the water when he needs it.

Q. Was he (Castrilla) willing that the deed should state that Mike should have the first right to use it?

A. If he needed it.

Q. Were you willing that the deed should so state?

A. (by the interpreter) He wants to know why Velotta should have the first right.

Q. Was he willing that the deed should say that Mike should reserve to himself the first right?

A. No, sir; he would not be willing that the contract says so; he can use the water any time he wants it."

Under this testimony we think the trial judge, before whom the case was heard without a jury, was warranted in finding that the tender made by appellants was accompanied by a condition, as to the conveyance of the seepage water, not warranted by the written agreement or contract, hence, of course, specific performance could not be awarded, and the defendants, appellants here, were not entitled to retain possession of the premises after the expiration of their leasehold right in January, 1908.

2. The evidence on the question of the amount of damage suffered by appellants while they were farming the land under their leasing agreement is conflicting. The fact that year after year they paid to appellees in cash the full stipulated rental price, without claiming any damage due to the insufficient water supply, greatly weakens the force of the testimony given by appellants on this subject. Their contract required that they pay one hundred fifty dollars a year for the use of the land, while they were farming it under the leasing agreement. This amount they did pay. The court fixed the appellees' damages at one hundred fifty dollars for each of

the years 1908 and 1909, being the two farming seasons during which appellants retained possession of the premises after the expiration of their leasehold rights.

There are other features connected with the case, and discussed in appellants' brief, which we have not found it necessary, after due consideration, to comment upon.

We cannot say from the record before us that the finding of the trial court was unjust or unreasonable, or that the appellants have not had substantial justice.

The judgment of the trial court is affirmed.

[No. 3611.]

MOUNTAIN SUPPLY DITCH CO. v. LINDEKUGEL.

1. PRACTICE—*Objection to Sufficiency of Complaint First Taken at Trial.* The practice of first objecting to the sufficiency of the complaint upon the trial condemned.

2. PLEADING—*Aider by Pleading Over.* Matters omitted from the complaint may be supplied by the answer.

3. IRRIGATING COMPANY—*Duty to Stockholders.* A corporation organized for the purpose of supplying water to its stockholders by means of reservoirs and ditches is charged by the law with the duties of reasonable care and diligence in procuring and storing the water, keeping its works in repair, and making ratable distribution of the water. When the land of a particular stockholder is so situated that it can be irrigated from certain reservoirs only, it is the duty of the corporation, if by reasonable care it is practicable, without prejudice to other stockholders, to retain in such reservoirs water sufficient to irrigate the lands of such stockholder; and if without excuse it fails in this duty, it is liable to the stockholder for any injury which may result.

The defendant owned three reservoirs. From only the upper two could plaintiff's lands be irrigated. Early in the season of irrigation, according to evidence given for the plaintiff, the water was drawn from the two upper reservoirs into the third, below plaintiff's land, and there remained stored through the entire season, while plaintiff's crops were perishing. Meanwhile, water was not distributed to the shareholders according to their respective holdings, but each received according to

his needs, and it appeared that those cultivating the lands of the president of the corporation had an abundance. Held, that under these circumstances plaintiff was not to be strictly limited to his ratable share, and that the jury were warranted in a verdict for plaintiff.

4. APPEALS—*Harmless Error.* An improper instruction manifestly favorable to the defeated party is harmless.

Appeal from Larimer District Court. HON. JAMES E. GARRIGUES, Judge.

MESSRS. RHODES & TEMPLE, for appellant.

MR. JOHN J. HERRING, for appellee.

KING, J., delivered the opinion of the court.

From a verdict and judgment in favor of the plaintiff in the sum of $1,225, the defendant appealed.

The first question presented by the assignments of errors is that the complaint does not state a cause of action. No separate demurrer was filed, but the sufficiency of the complaint was challenged by a clause incorporated in the answer, and the attention of the court was first called to it after the jury had been empaneled and sworn to try the cause upon its merits. That practice has become customary in some sections of the state, but is not to be commended, either as to the manner of pleading or the delay in presenting the issue of law. It is a custom "more honored in the breach than in the observance." It is dilatory and savors of obstructive tactics rather than of an attempt to reach trial on the merits. The demurrer was overruled, and no objection on the ground of insufficiency of the complaint was made to the evidence offered. However faulty it may be, we think the complaint, as aided by the answer, which to some extent cured its defects, may be sustained. It is alleged in substance that defendant, appellant here, is a mutual ditch company organized as a corporation under the laws of Colorado for the purpose of furnishing water

to its stockholders for irrigation; that plaintiff was a stockholder of said corporation to the extent of 62½ shares, and was the owner of 240 acres of land requiring irrigation, lying under defendant's ditches and reservoirs, and having no other source of supply; that in the spring of 1907 plaintiff prepared and seeded to grain 178 acres of said land, and was entitled to and demanded water for its irrigation; that a small quantity was furnished in June, sufficient only to irrigate 40 acres once, and that thereafter defendant failed, refused and neglected to furnish plaintiff any water; that it purposely and voluntarily diverted all the water stored in certain reservoirs for the express purpose of irrigating plaintiff's land, and the only reservoirs from which his land could be irrigated, from those reservoirs into other reservoirs and to other lands, by reason of which plainitff's crops were destroyed or seriously injured. Defendant answered denying its wilful diversion of the water so stored, as alleged in the complaint, and alleged that it distributed the water in accordance with its regular custom, and to the best interests of all its stockholders, including the plaintiff whenever he was entitled thereto and it had any water for the use of its stockholders, thus putting in issue the very matter which defendant contends was necessary to be pleaded in the complaint in order to state a cause of action.

The defendant company, having been organized for the purpose of supplying water to its stockholders by means of a ditch and reservoir system, assumed and was charged by law with the duty of exercising reasonable care and diligence in procuring and storing the water, keeping its storage reservoirs in repair and condition to retain the same, and making ratable distribution thereof; and if plaintiff's land was so situated that it could be irrigated from certain reservoirs only, it was its duty, if practicable, by the exercise of reasonable care and dil-

igence, and without prejudice to the other stockholders, to retain a sufficient amount of water in such reservoirs to irrigate those lands.—*Rocky Ford, etc., Co. v. Simpson,* 5 Colo. App., 30, 33, 36 Pac., 638; *Knowles v. Clear Creek, etc., Co.,* 18 Colo., 209, 32 Pac., 179; *Miller v. Imperial Water Co.,* 156 Cal., 27, 103 Pac., 227, 24 L. R. A. (N. S.), 372. Its failure to perform this duty and the injury resulting to plaintiff therefrom is charged in the complaint. No reason is assigned why the defendant, in the exercise of that reasonable care and ordinary prudence with which it was charged, should run the stored water out of the upper reservoirs, whence it could be readily distributed to all parties entitled thereto, until it became apparent and reasonably certain that they could be refilled from the stream, or unless the condition of the reservoirs rendered it unsafe to retain the water therein. It is asserted by defendant that the reservoirs were refilled to about the extent of the depletion, but upon that point the evidence was conflicting.

It is contended that the evidence is insufficient to support the verdict. It was admitted that defendant is a mutual ditch company, but is claimed that the evidence fails to show either wilful or negligent failure of defendant to perform any of its duties, and particularly that it failed to deliver to the plaintiff his full share of the water in proportion to his stock. The evidence on plaintiff's part shows that early in May all the water was run from the two upper reservoirs, the only ones from which plaintiff could be supplied that year, into another situated below his land, and there held unused throughout the entire season while plaintiff's crops were burning up with drought. Defendant's evidence shows that the water was not being distributed in proportion to the stockholding, but to each stockholder what he might need while the water lasted; and it is further shown by one of its witnesses who farmed a large acreage that year

for the president of the company, that he had plenty of water. Under this evidence the plaintiff could not be limited to his strict *pro rata* share while water was being held unused. Whether the defendant exercised reasonable care and diligence for the protection of plaintiff's rights as a stockholder when it ran all the water from the upper storage to the lower, and whether in fact it did so divert it, wilfully or negligently, were matters for the jury, and its finding on competent, substantial, conflicting evidence is conclusive on this court, although we may believe from a reading of the record that the verdict might well have been otherwise. The verdict is not obviously excessive, and counsel have not pointed out wherein its excess, if any, may be discovered.

It is also contended that Instruction No. 5, given by the court, is erroneous. In that respect we agree with counsel, as there is no evidence on which to predicate the instruction; but it is manifestly favorable to the defendant, and not therefore prejudicial to it. Reversal may not be required unless appellant shows error, actually or presumptively prejudicial to it.—*Harrison v. Hodges et al.*, 49 Colo., 105, 111 Pac., 706.

The judgment is affirmed.

[No. 3612.]

STEVENS V. TOMPKINS.

1. APPEAL—*Verdict on Conflicting Evidence*, will not be disturbed.
2. —— *Appeal Where No Appeal Lies.* Appeal from a judgment for less than $500, in a cause not involving a franchise or freehold, no error appearing, and appellee having failed to enter his appearance, judgment was affirmed under rule 1 of this court.

Appeal from El Paso County Court. HON. JOHN E. LITTLE, Judge.

Mr. WILLIAM C. ROBINSON, for appellant.

No appearance for appellee.

KING, J., delivered the opinion of the court.

Action for the reasonable value of materials furnished and labor performed by plaintiff (appellee here) for defendant at his request, in repairing a building belonging to defendant. Judgment for plaintiff from which defendant appealed.

The errors assigned and relied on raise only the question of the sufficiency of the evidence to support the verdict and judgment, the contention being that the verdict includes compensation for work and material for which no provision was made in the contract between the parties, as shown by the evidence. The testimony upon the part of the plaintiff was positive and clear that the materials furnished and the work done was in accordance with directions given by the defendant, and if believed by the jury, was amply sufficient to sustain the verdict. The credit to be given to the witnesses was for the jury to determine, and having resolved the issues in favor of the plaintiff upon conflicting evidence, the verdict may not be disturbed.

The judgment was for an amount less than $500, did not relate to a franchise or a freehold, and therefore an appeal therefrom to the supreme court did not lie, and the cause might and perhaps should be dismissed for lack of jurisdiction to entertain the appeal. Inasmuch as the appellee has entered no appearance, and therefore jurisdiction of his person has not been obtained, the cause, if dismissed, cannot be re-entered as pending on error.—*Brady v. People,* 45 Colo., 364, 101 Pac., 340; *Perkins v. Russell,* 21 Colo. App., 212, 121 Pac., 955; *D. & R. G. R. R. Co. v. Casady,* 50 Colo., 351, 115 Pac., 532. And we think if dismissed, it is a proper case for the application of Rule 1 of this court that,

whenever an appeal or writ of error shall be dismissed, the court may, in its discretion, affirm the judgment of the court below. But whether affirmed upon the merits of the cause, or under the rule, the effect is the same.

The judgment is affirmed.

[No. 3619.]

GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN v. TAYLOR, GUARDIAN.

1. APPEALS—*Law of the Case.* The opinion of the supreme court in a former appeal in the same cause is the law of the case in a second appeal, upon substantially the same pleadings and evidence as in the first.

2. EVIDENCE—*Admissions—Former Testimony of Party.* The testimony of one of several joint plaintiffs, given in the first trial of a cause, may be read for the defendant at the second trial as an admission against interest, even though the party so testifying is present in court at such second trial.

Sec. 7284 of the Revised Statutes has not the effect to deprive a party of the advantage of prior admissions by an adversary.

3. FRATERNAL SOCIETIES—*Collection of Membership Dues.* Fraternal societies make their own laws and regulations. There is no provision of law for the collection of the dues of members by legal proceedings.

It is essential that they enforce such a discipline among their members that the subordinate bodies of which the order is composed may promptly collect their dues.

Appeal from Pitkin District Court. HON. JOHN T. SHUMATE, Judge.

Mr. S. S. ABBOTT, for appellant.

Mr. LYMAN H. HAYS, for appellee.

BELL, J.

This suit was brought in the district court of Pitkin County, Colorado, by Uriah Taylor, as guardian of May, Helen, William and Bryan McDonald, minors, heirs of

William H. McDonald, deceased, against the Grand Lodge of the Ancient Order of United Workmen of the State of Colorado, on a certificate of insurance to recover the sum of $2,050.00, with interest at the rate of 8 per cent per annum.

The controlling issue in the case is whether the deceased, William H. McDonald, or anyone for him, paid the assessment due in February, 1904, before the death of the insured, which took place about March 13th, 1904.

William H. McDonald, deceased, held his certificate on condition that he should "pay assessments made upon him for the beneficiary or guaranty fund or lodge dues to the financier of the lodge of which he was a member on or before the last day of the month, in which said assessment or lodge dues are levied (or) shall forfeit all his rights as such member, shall stand suspended from all rights, benefits and privileges of the order from and after that date, and shall not be reinstated except as hereinafter provided."

The power is taken away by the constitution of the order from any grand lodge officer, subordinate lodge or any other officer to waive any provision whatever of the constitution of the lodge.

Under the constitution and general laws of the order any suspended member who has forfeited all of his rights by reason of the non-payment of his assessments for the beneficiary or guaranty funds or lodge dues may be reinstated, if he be living, at any time within three months from the date of such suspension by paying all assessments and lodge dues that have been levied during the time of the suspension, including the pending assessments and dues at the time of the suspension, and upon furnishing a certificate of good health at the time the assessments are paid in the manner and upon the blank prescribed by the order, by a majority vote of the lodge.

It is charged and proven that there was an assess-

ment called for on the first day of February, 1904, as provided for in the laws of the order; and it is charged by the appellant that the said William H. McDonald did not pay the same on or before the last day of the said calendar month, to-wit, the last day of February, 1904, and by reason of the non-payment thereof the said McDonald became suspended from the order, and lost and forfeited all his rights, and that the said beneficiary certificate became suspended; and that the said McDonald was never in his lifetime reinstated in said order, and could not, under the laws of said order, be reinstated after his death.

The appellee avers in his replication that the appellant is estopped to plead the constitution and laws of the order or of the state because, he alleges, that the order has, by custom and conduct in dealing with the deceased and other members of the order, waived and condoned the payment of all dues, assessments and requirements of the technical regulations of the order, and pleads payment on the 26th day of February, 1904, of the $3.50 assessment then due.

This case was before the supreme court on substantially the same pleadings and the same evidence as are before us in this hearing, and was decided at the September Term, 1908, and is reported in 44 Colo., 373-378, 99 Pac., 570.

The opinions of the supreme court on a former appeal of the case, become thereafter the law of the case as to all questions passed upon by it.—*The First National Bank of Ouray v. Shark, City Treasurer,* 53 Colo., 446, 128 Pac., 56-60.

When this case was before the supreme court it held that:

"No officer or member of the supreme, or of the subordinate or inferior lodge, had the power to waive performance of any duty imposed upon or required by

any lodge officer or member by any of the laws, rules, or regulations of the supreme lodge."—*Grand Lodge of the Ancient Order of United Workmen v. Taylor,* 44 Colo., 376, 99 Pac., 572.

The supreme court further held that:

"The uncontradicted evidence is that McDonald, the insured, died not later than the 13th day of March, 1904. The assessment upon him and other members for the next preceding month of February had been levied, and the assessment was not paid before the last day of that month or at all, and was not tendered by anyone to the financier until the 14th of the following month of March, the day after the death of the insured.

"Mugfur was then the financier of the lodge. Its members, it appears, were mostly workingmen, and to accommodate them Mugfur permitted payments of monthly assessments to be made to his wife at their home, and authorized her to sign receipts for such payments in his name. The evidence is clear, that no one but Mugfur and his wife had any authority to receive payment of assessments. Both of them swore positively that neither McDonald nor anyone for him, paid, or offered to pay, McDonald's February assessment during that month. The day after McDonald's death, one of his children tendered to Mugfur the February assessment, but was informed at the time by him that it was too late and that he could not receipt for the same. Being further importuned to accept this money and tender it to the subordinate lodge to see if it would be accepted by the order, Mugfur took the money from the insured's daughter and told her that, while he could not receipt for the same, he would present the matter to the lodge to see if any relief could be given. Subsequently he presented his request to the lodge and was informed that under the rules and regulations the money could not be accepted, and was ordered to return the money. Mugfur tendered

the money back to the insured's daughter, and she refused to accept it. The only testimony that might be claimed as tending to contradict this testimony was the statement of Mugfur himself on cross-examination that some of the members of the order, but not McDonald, had left money for their assessments with a local merchant, which afterwards was tendered to the financier and receipts therefor given; and that assessments, but not McDonald's, had sometimes been received after the last day of the particular month for which they were levied; but in no case is there any evidence that money had been tendered by, or accepted from, beneficiaries of an insured after his death.

"We think this evidence shows that McDonald's assessment for the month of February was not paid during that month, and that payment of the same was not tendered until after his death. This, under the plain and unambiguous language of the rules and regulations of the order, operated as a suspension, and thereby the insured forfeited all rights to participate in the beneficiary fund."—44 Colo., 371, 378, 99 Pac., 572, *supra.*

This effectually disposes of the claim of waiver or estoppel of the subordinate lodge or the supreme lodge as far as the evidence was concerned when before the supreme court.

We think that there is no material change in the weight of the evidence now from what it was when before the supreme court.

On the first trial the plaintiff tried the case upon the theory that the money to pay the February assessment was left with May McDonald in due time and that she, for some cause, failed to pay the same; and on the further assumption that the financier of the lodge had been accustomed to receive the money after the suspension and therefore it was estopped from claiming a forfeiture.

The supreme court, when this case was before it, conclusively settled that question. After discussing the contention of the appellee that the financier had at some times received assessments after the last day of the particular month for which they were levied, the court forcibly said:

"But in no case is there any evidence that the money had been tendered by or accepted from beneficiaries of an insured after his death.

"We think this evidence shows that McDonald's assessment for the month of February was not paid during that month and that payment of the same was not tendered until after his death, and thereby the insured lost all right to participate in the beneficiary fund."

We have closely compared the evidence considered by the supreme court when the case was before it and the evidence presented to us here, and there is no substantial difference, except that the trial court in the second trial excluded, wrongfully we think, the admissions of May McDonald, one of the beneficiaries, in her testimony in the original trial to the effect that her father gave her the money to pay the February assessment and told her to pay it if he did not, and that she kept the money until after the death of her father and then tendered it to the financier of the lodge; that she knew that her father was dead at the time, and knew that he had not paid the assessment.

On the first trial in the district court the chief purpose seemed to be to establish a custom to take money after the suspension for failure to pay.

The supreme court held, when the case was before it, that this did not relieve them from a failure to pay before the insured died.

On the second trial the pressure seems to have been directed toward an effort to prove an actual payment of the assessment within the time required by the regula-

tions of the order; but we think they utterly failed to improve on the case as presented in the supreme court.

The appellee did not call May McDonald as a witness. The appellant called the stenographer who took her testimony when on the stand in the former trial wherein she admitted that her father gave her the money to pay the assessment on or about the 26th day of February, 1904, and directed her to pay if he did not, and had him thoroughly identify her testimony and then offered it in evidence as admissions against her interests as a beneficiary under the certificate. Counsel for appellee objected because she was in court and could testify. The judge sustained the objection, particularly calling attention to Section 7284 of the Revised Statutes of 1908, permitting one party to an action to call another party opposing him to the stand for cross-examination without the party calling for such examination being concluded thereby and allows the party, so calling for such examination, to rebut it by counter testimony.

We think this clearly injurious error. The statute cited does not take from either party any legal right they had before to use the admissions of parties in interest made in opposition to principles for which they were then contending.

Jones on Evidence, 2nd Ed., Section 236, states the rule in this language:

"If the testimony is of such a character as to constitute an admission of the parties, it is not necessary to lay a foundation for its reception by first asking the party if he has made such statements, nor is it necessary that the statement should at the time of making it appear to be against the interest of the party. The statement is admissible if at the time of the trial it is inconsistent with the contention of the party who made it."

Mr. Jones further states:

"In a suit by or against several persons, who are

proved to have a joint interest in the decision a declaration made by one of them while engaged in the joint business concern—a material fact within his knowledge is evidence against him and against all who are parties with him in the suit."—Jones on Evidence, *supra,* Section 248.

In speaking to the same subject our supreme court says:

"The fourth error assigned is the court erred in allowing the defendant to introduce in evidence the testimony of the appellant given on the trial of this action in the county court. The objection made to the introduction of this evidence and to the reading of the same to the jury, was that the appellant was present in court and could have been made a witness. This objection is not well taken. The sworn testimony of a party to an action may be used against such party as an admission." —*Buddee v. Spangler,* 12 Colo., 216-223, 20 Pac., 763; *Clayton v. Clayton,* 4 Colo., 410-417; *Holman v. Land, etc.,* 20 Colo., 7-12, 36 Pac., 797.

We find the overwhelming weight of the evidence in both records sent to the supreme court against the allegation that the assessment, due in February, 1904, was paid; and we think in each instance that the trial judge should have directed judgment in favor of the defendant.

These fraternal organizations are not for profit, but, as the certificates, constitution and by-laws indicate, a body of neighbors, usually of small means, who affiliate for mutual benefits, and each member is subject to the same rules and regulations. It is essential that they require such discipline as will enable the circles or lodges to promptly collect their dues so as to meet their obligations; otherwise the very existence of the body would be destroyed.

There is no provision or authority, either by the lodges or the state, for the collection of dues by process

of law. The organization makes its own laws and regulations. The relations of the members to the lodge are such that every member knows these regulations and is aware of the consequences if he dies while suspended. And, as much as we may regret to see these beneficiaries lose all interest in the benefit fund, we are compelled, under our duties, to enforce all rules and regulations, like those involved in this case, on the demand of the lodges against their own members.

There are many more important questions raised in this record, but we feel that we should devote no more time to the same, and the judgment is hereby reversed for the reasons herein stated.

[No. 3624.]

CITY AND COUNTY OF DENVER v. RHODES.

1. NEGLIGENCE—*Questions for Jury.* In an action for negligence, all questions of fact are for the jury.

2. MUNICIPAL CORPORATIONS—*Defective Walks—Snow and Ice.* Municipal corporations are under duty to use reasonable care to maintain the public walks in reasonably safe condition.

A week of changeable weather had succeeded a considerable fall of snow—thawing by day and freezing by night. The walk upon which certain vacant lots abutted had not been cleared, and had become rough, slippery and dangerous. Plaintiff was injured by a fall attributable to these conditions. Held, it was for the jury to say whether, under the circumstances, the city had notice of the unsafe condition of the walk, whether, by reasonable effort, the city, after such notice, might have corrected the defect, and whether it was negligent in failing to do so.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. H. A. LINDSLEY, Mr. F. W. SANBORN, Mr. G. Q. RICHMOND, Mr. W. H. BRYANT, Mr. J. A. MARSH, for appellant.

Mr. STEPHEN W. RYAN, Mr. H. N. HAWKINS, for appellee.

HURLBUT, J., delivered the opinion of the court.

Action begun February 13, 1909. In her amended complaint plaintiff (appellee) alleges that she received personal injuries from having fallen upon defendant's sidewalk on December 22, 1908. The right to recover is based upon the alleged negligence of defendant in permitting an accumulation of snow and ice to remain upon its sidewalk in a populous part of the city from December 17th to the 22nd, after due notice of the unsafe condition of the sidewalk occasioned thereby. Plaintiff recovered judgment, and the case is here by appeal.

The undisputed evidence tends to show that there was a snowfall of about eight inches on December 16th and 17th, followed by general cold weather from that time until the 22nd; that about 7:30 in the evening of the last mentioned day plaintiff, accompanied by three other pedestrians, was walking on the sidewalk in a westerly direction on the north side of Fourteenth avenue, and after crossing the alley between Pennsylvania and Logan streets stepped upon the sidewalk and immediately slipped and fell thereon, receiving the injuries of which she complains; that the part of the sidewalk on which she fell was covered with a rough and slippery accumulation of ice and snow and was in an unsafe condition for use by pedestrians; that the place where the injury occurred was in a populous residential portion of the city; that the sidewalk where the accident happened was adjacent to vacant lots; and that the city had known for years that the lots adjoining the sidewalk where the injury occurred were vacant. The evidence also shows amount of thawing, freezing, and sunshine each day, and the general weather conditions existing at the time and for a week or more prior to the happening of the accident.

The rule respecting duties of municipalities to maintain safe sidewalks for the use of pedestrians is stated in *City of Boulder v. Niles,* 9 Colo., 415, 12 Pac., 632, as follows:

"It may be said generally that the duty imposed upon municipal corporations in respect to its sidewalks is a duty to keep them in a reasonably safe condition. Upon persons using the sidewalks the duty imposed is that of ordinary care. Under conditions of unusual danger there is imposed a duty of increased care. These are general principles to be understood and applied in the light of the circumstances of each particular case."

In 28 Cyc., p. 1373, we find the following:

"The rule requiring a municipal corporation to exercise ordinary care to keep its sidewalks in a reasonably safe condition for the ordinary purposes of travel, applies to the removal of accumulations of ice and snow, and for injuries due to its negligence in this regard it will be liable," etc.

In the instant case it is conclusively shown that the accumulation of ice and snow on the sidewalk rendered the same unsafe for travel by pedestrians. The extent of the snowfall is also shown, condition of the weather thereafter, location of the sidewalk as a public way, and lapse of time between the snowfall and accident. Such being the case, the court below left it to the jury to say whether or not, under all the circumstances, the city had due notice of the unsafe condition of the sidewalk and a reasonable time thereafter in which to remove the ice and snow, and whether or not in the exercise of reasonable care the city was negligent in not remedying the defect prior to the accident. The jury passed on these questions, and rendered a modest verdict for plaintiff. The case seems to have been fairly and impartially tried. We are not inclined to disturb the verdict nor would we

have felt disposed to disturb the verdict had it been in favor of defendant. The general current of authority seems to assign to juries the duty of determining controverted facts in this class of cases.—Thompson on Negligence, Sec. 6184; *Cloughessey v. City of Waterbury,* 51 Conn., 405, 50 Am. Rep., 38; *Collins v. Council Bluffs,* 32 Ia., 324, 7 Am. Rep., 200; *Hall v. City of Lowell,* 10 Cush. (Mass.), 260; *Scoville v. Salt Lake City,* 11 Utah, 60, 39 Pac., 481; *Foxworthy v. City of Hastings,* 25 Neb., 133, 41 N. W., 132; *Townsend v. City of Butte,* 41 Mont., 410, 109 Pac., 969; *Nebraska City v. Rathbone,* 20 Neb., 288, 29 N. W., 920; *District of Columbia v. Frazer,* 21 App. D. C., 154; *Griffith v. City and County of Denver,* 54 Colo., 432, 132 Pac., 57, decided by the supreme court (Colo.) April 7, 1913. In the last case cited the court was called upon to decide whether or not the city was negligent in constructing and maintaining a sidewalk at a greater angle than that fixed by ordinance. It was held that the city's acts in that respect were not negligence *per se,* but it was for the jury to decide whether or not, under all the circumstances of the case, the sidewalk so constructed and maintained was dangerous to travel and constituted negligence on the part of the city. Justice Bailey, speaking for the court, said:

"The testimony shows that the walk in question had an inclination toward the street slightly in excess of that fixed by ordinance. Counsel for plaintiff urge that this conclusively establishes negligence against the city. The court instructed the jury that such fact did not in and of itself alone necessarily establish negligence, but that it was a fact which the jury should take into consideration, with all of the other testimony, in reaching a conclusion as to whether the walk was of a defective or dangerous construction. * * * The effect of the excessive inclination upon the safety of the walk was one of

fact, involving the question of negligence on the part of the city, a matter clearly for the jury to determine upon all of the testimony, where it was properly left."

Reading the instructions as a whole, we think they were consistent with each other, and fairly submitted the case to the jury upon all substantial issues before them for consideration.

Under the views above expressed we deem it unnecessary to notice other assignments of errors discussed by counsel in their oral argument and briefs. The judgment is affirmed.

CUNNINGHAM, P. J., and KING, J., dissent.

[No. 3625.]

WELLINGTON REALTY CO. v. GILBERT.

1. CONTRACT—*Construction—When Consummated.* A contract is consummated when the minds of the parties meet understandingly in the same sense.

Appellee purchased of appellant a certain block of lots in an addition to the City of Boulder. He dealt with reference to a plat delivered to him by appellant, showing the block to contain fourteen lots. A written agreement of sale was framed, describing the property as "Block Two (2)" in the addition, "according to the recorded plat thereof." In fact, no plat was then recorded. Later a new agreement was executed and accepted, bearing the same date, and in the same words as the original, save in respect to the signature, in which a clerical mistake had occurred. Held, that the contract was consummated at the date of the original agreement, and, the block being made to contain only twelve lots by the plat afterwards recorded, appellee was held entitled to a corresponding diminution in the price.

2. MAXIMS—*Falsa Demonstratio.* A contract was entered into for the purchase of a certain block of lots, in a certain townsite, describing the premises as "Block Two (2)," etc., "according to the recorded plat." No plat was then of record, and the purchaser dealt according to and upon the fact of a blueprint exhibited to him by the seller, as the true plat of such townsite. The purchaser was entitled to the premises de-

scribed in the blueprint as Block 2, the phrase "according to the recorded plat" being rejected as false demonstration.

3. EVIDENCE—*Parol Admissible.* Parol evidence is admissible to show the circumstances attending the execution of a writing.

4. VENDOR AND VENDEE—*Vendor Unable to Convey in Part—Abatement of Price.* One who agrees to convey a body of land for a specified consideration, and, by his own act, renders himself incapable of wholly fulfilling his contract, may, at suit of the purchaser, be required to convey all that he is able to convey, with an abatement in the agreed price equal to the difference in value between what was agreed for and what is conveyed.

Appeal from Boulder District Court. HON. HARRY P. GAMBLE, Judge..

Mr. O. A. ERDMAN, for appellant.

Messrs. REED, WEST & GOSS, for appellee.

BELL, J.

We gather from the record before us in this case that on February 20th, 1907, The Wellington Realty Company, appellant, presented to Oscar M. Gilbert, appellee, a blue print copy of a plat of Wellington Heights Addition to the City of Boulder, Colorado, exhibiting an area of ground 350x285 feet, marked block two (2), containing 14 lots, and represented that a plat of same was filed in the clerk's office of said county; that, with the aid of said blue print or plat, the appellee made a personal examination of the ground, and compared it with the description exhibited on the blue print, and, relying on such blue print, the representations of the appellant, and the ground itself when examined, the appellee negotiated for and purchased said block two (2), for which he paid $100.00 in cash on February 20th, 1907, and agreed to pay $900.00 more in 30 days, and an additional sum of $4,000.00 within two years from the last named date, and to pay 6 per cent on deferred payments

until due; that the appellant then and there agreed with appellee, in writing signed by it, to sell said premises on said terms, and on said date receipted for said $100.00 payment, and agreed in writing to execute and deliver to appellee a good and sufficient warranty deed for said block, on the completion of said payments, and to accompany said deed with an abstract showing a perfect title to said premises; that before the $900.00 payment became due the appellant informed the appellee that it would be necessary for it to obtain a court decree quieting the title to said block in the appellant, and then and there executed, signed and delivered to the appellee a written extension of the time of payment of said $900.00 until said title could be quieted in the appellant; that on the 24th day of September, 1907, the appellant, in writing, notified the appellee that the technical defect in the title to the land had been removed, and demanded the immediate payment of the $900.00; that on September 25th, 1907, the appellee tendered the $900.00 but limited the tender, in writing, to the contract made February 20th, 1907, and to the land purchased as it appeared on the plat exhibited to the appellee on February 20th, 1907, and, notwithstanding such limitations, the appellant then and there accepted said payment.

At the time the said $900.00 payment was tendered as aforesaid, according to the testimony of the appellee, the appellant said:

"By the way, this contract was signed by Mr. Degge as president of The Wellington Association instead of The Wellington Realty Company, a technical error, and we have made out a duplicate of that which you sign first; you haven't signed the other one so sign this."

The appellee further testified as follows:

"I took that (duplicate) and read it over and we compared them word for word, and I asked Mr. Webber

(sales agent for both companies) if it was understood that this was a duplicate of the other to correct the technical error—the signature of The Wellington Association instead of The Wellington Realty Company. He (Webber) said 'it was—otherwise identical'. At the suggestion of Mr. Webber I signed it."

Agent Webber testified at the trial that when he sold block two (2) to appellee in the name of the Wellington Association the legal title stood in the name of W. W. Degge, the president of each company, and the property was handled by him (Degge) through the association, but that afterwards the title was transferred to The Wellington Realty Company, when new contracts were made out to take the place of the original ones.

However, W. W. Degge, president of each company, testified that block two (2), February 20th, 1907, belonged to The Wellington Realty Company; that the Wellington Association was financing The Wellington Realty Company and owned a large block, if not the bulk of, The Wellington Realty Company stock, and stated that he intended to sign the name of The Wellington Realty Company to the written agreement of sale, but, by force of habit, he inadvertently signed the name of The Wellington Association, as most of the sales were then being made through it; but announced to the court that he did not mean to take advantage of that or to go back on the signature and would not repudiate the agreement on the ground that it was signed by The Wellington Association. Whereupon counsel for appellant announced in open court:

"We are perfectly willing that the record may state that The Wellington Realty Company was bound by this instrument."

On February 20th, 1908, the appellee tendered $240.00 to the appellant, the interest due on the deferred

payment, and accompanied the same with a writing confining the tender to a payment on the contract dated February 20th, 1907, for purchase of block two (2) according to the plat exhibited to the appellee at the time of the purchase. The appellant accepted the tender and money.

On February 20th, 1909, the appellee tendered the balance of the purchase money in gold and demanded a deed for block two (2) covering 14 lots. The appellant made a counter offer to accept the money and give a deed covering 12 lots, and afterwards the appellee offered to take a deed for block two (2) covering 12 lots if appellant would allow a reasonable sum for the two lots eliminated in the amended plat.

It developed after the consummation of the purchase that no plat covering said block two (2) had been filed, and no plat was ever filed in the clerk's office until April 3rd, 1907, covering block two (2), and this plat and the survey for it were made by the same engineer who made the original plat which was in existence, but not recorded, on February 20th, 1907.

As we understand the record, the plat, of which the appellee had a blue print, was not acceptable to the city as an addition to the City of Boulder, and that the blocks prepared for said addition in the amended plat were required to be, and were, reduced to respective areas of 300x285 feet and to 12 lots, so as to render the same admissible as an addition.

The trial court found on adequate testimony that the reduction of block two (2) to the smaller area, and so that it covered only 12 lots after the sale to the appellee, reduced the value thereof $1,100.00 and deducted this amount from the original purchase price and ordered the appellee to pay the remainder thereof, and that the appellant should execute and deliver to the appellee, upon

tender made to it of the remainder above mentioned, a good and sufficient warranty deed for said block two (2) as reduced in area, together with an abstract thereto showing a clear title thereto as provided in the original instrument of sale.

From the foregoing statements it will readily be seen that the controlling points of contention between the parties are as to the time when the contract was consummated, and the area of the block sold. The appellee says that it was consummated February 20th, 1907, and that he then purchased block two (2) containing 14 lots.

The appellant says the contract was not consummated until September 25th, 1907, and at that time block two (2) contained only 12 lots.

The contract was consummated when the minds of the parties met, understandingly, in the same sense.

On February 20th, 1907, the appellant stated, in writing, every condition necessary to make a completed agreement, and the same was signed by The Wellington Association by W. W. Degge, president, and who, with counsel for appellant, agreed that his signature was intended to bind, and should bind, the appellant company.

The appellee on February 20th, 1907, understandingly, accepted the terms of the appellant, paid the $100.00 required of him on the purchase price on that day, and has diligently sought to comply with every condition on his part from that time until the present.

The contract of purchase and sale between the parties was completed on February 20th, 1907, and the property, as then contracted for, must be delivered by the appellant according to the terms of the contract, without reduction on its part, otherwise it will be held responsible to the appellee for the difference in the value thereof.

The first real contention arises upon the wording of the written offer of sale signed by the appellant and delivered to the appellee. The offer of sale was of block two (2) in Wellington Heights Addition to the City of Boulder, Colorado, *according to the recorded plats thereof.*"

The evidence discloses that a survey had been made of a large plot of ground and that it had been divided into blocks and lots for the purpose of making it an addition to the City of Boulder, and The Wellington Association, through which the property was being handled, had the plat thereof blue printed and was using it for the purpose of advertising and selling the property represented therein. This blue print showed that block two (2) covered 14 lots and had an area of 350x285 feet; and appellee swore on the hearing that the appellant furnished him a blue print and especially pointed out to him on the plat, and informed him, that said block two (2) contained 14 lots and the area as above set forth.

It is evident to our minds that this contract was made for the 14-lot block, and the understanding of the parties was, at the time the sale was closed, that the appellant was selling and that the appellee was purchasing, a 14-lot block.

The appellant says, however, that at the time the writing was made, on February 20th, 1907, no plat covering block two (2) was recorded. That is quite true; but it was the appellant that falsely stated in the written instrument of sale, as well as verbally, that it was selling this block *according to a recorded plat.*

There is and was no question before the parties as to whether a plat was recorded for the purpose of validating the addition. In fact, the appellee testified that he did not care to have the land in question included in the addition, that what he desired was the area of the

ground bargained for. The purpose for which the plat was used was to assist in identifying the ground, and determining the location and area thereof. The only plat in existence covering block two (2) was used for these purposes, but it turned out not to be of record as represented by the appellant. If this misrepresentation should have been by inadvertence or honest mistake, and either of the parties should be required to sustain a loss thereby, then it should fall upon the one who was first at fault. However, we do not apprehend any such serious results from this misrepresentation. The plat without being recorded served all the purposes for which it was desired.

In speaking to a like question the supreme court of Michigan said:

"The deed, it is true, referred to a plat adopted by the Portsmouth Company and stated to have been recorded; but those deeds would, I think, still be good, though the plat would not in fact have been recorded; the declaration that it was recorded would be rejected as *falsa demonstratio*—as an incidental circumstance of much less importance than the fact of the existence of the plat itself—and therefore a fact about which the parties drawing the deed would be likely to be less careful and precise."—*Johnstone v. Scott,* 11 Mich., 231.

We can see no pertinence in the contention of the appellant that the contract was consummated on September 25th, 1907. The evidence shows that there was no endeavor upon that day to make a new contract; but the parties themselves, on the initiation of the appellant, sought to reform the contract consummated February 20th, 1907, so as to show The Wellington Realty Company as the grantor instead of The Wellington Association, as the parties intended to do and should have done when the contract was closed in February. In the substituted contract the parties re-copied the whole of the

We are impressed with the conclusions that the pleadings and evidence, in this case, justified the findings and decree of the court and that substantial justice has been done and, therefore, such findings and decree are hereby affirmed.

[No. 3410.]

LITTLE v. HOWELL.*

TAX TITLES—*Deeds—Acknowledgment.* A treasurer's deed not acknowledged substantially as prescribed by statute, is void. The acknowledgment must be made by the person who executed the conveyance, and this must appear from the instrument itself. A deed purporting to be executed by the treasurer in person, bearing a certificate that it was acknowledged by his deputy, must be rejected.

That the initials of the deputy appear below the signature of the treasurer will not be received to raise the presumption that in fact the deed was subscribed by the deputy.

Appeal From Washington County Court. HON. C. W. BALLARD, Judge.

Mr. AUGUST MUNTZING and Mr. EGBERT MORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

WALLING, Judge.

Appellant, who was the plaintiff in the lower court, brought this action against appellee, under the code, for the purpose of quieting the alleged title of the plaintiff to certain lands as against any adverse claim of the defendant.

The only matter presented for our determination is the alleged error of the trial judge in refusing to permit the plaintiff, upon the trial, to introduce, as evidence of his claimed title to the land in controversy, an instru-

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*This report should have appeared in 22 Colo. App. Manuscript mislaid by printer.

ment purporting to be a treasurer's deed executed in pursuance of the sale of the land for delinquent taxes. The principal objection to the admission of the deed, and the only one discussed in the briefs, turned upon the signature to the supposed deed and its acknowledgment, and special reference will be made to such parts of the instrument as are deemed essential to the determination of that objection. The body of the instrument was substantially in the form of the treasurer's tax deed prescribed by the statute, the granting clause commencing with the words, "Now, therefore, I, J. F. Dole, treasurer of the county aforesaid," etc. The following are copies of the *in testimonium* clause, signature, and certificate of acknowledgment:

"In witness whereof, I, J. F. Dole, treasurer as aforesaid by virtue of the authority aforesaid, have hereunto set my hand and seal this fifth day of October, A. D. 1898. J. F. DOLE, (Seal)
Treasurer.
F. D.

State of Colorado, County of Washington—ss.

I hereby certify that before me, John C. Hudson, Co. Clerk in and for said County, personally appeared the above named J. F. Dole, by F. W. Dole Dep. Treasurer of said County, personally known to me to be the Treasurer of said County at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to, and who executed the above conveyance as Treasurer of said County, and who acknowledged the execution of the same to be his voluntary act and deed as Treasurer of said County, for the purposes therein expressed.

Given under my hand and official seal, this 5th day of October, A. D. 1898.

JOHN G. HUDSON,
County Clerk."

The fact that the initials "F. D." followed the apparent signature of the treasurer has given rise to an extended discussion as to whether it should be presumed that the instrument was in fact subscribed by that officer, in the absence of any evidence of the fact; and it has been suggested that it may be assumed, in support of the deed, that it was signed by the deputy treasurer, in the name of the principal officer. But we have no means of determining whether the name of the treasurer was subscribed by himself, or by another, or what the initials beneath the supposed signature signified, and we have no right to indulge any presumption in that regard. Evidently the initials mentioned cannot be regarded as the signature of the person who executed the deed. Under the statute the due execution of a tax deed must be proved by its acknowledgment, and no other evidence of the fact of execution could be allowed. This is because the statute has made the acknowledgment of the deed an indispensable part of its execution, and a deed not acknowledged substantially in the prescribed manner is void.—*Empire R. & C. Co. v. Bender,* 49 Colo., 522, 113 Pac., 494; *Matthews v. Blake,* 16 Wyo., 116, 92 Pac., 242, 27 L. R. A. (N. S.), 339.

The certificate of acknowledgment annexed to the instrument here in question was in the statutory form, except that the words, "by F. W. Dole, dep." are inserted between the name "J. F. Dole" and the words "treasurer of said county," indicating that the acknowledgment was made by a deputy, in lieu of the person whose name was subscribed to the deed as treasurer. Whether this form of acknowledgment would have been sufficient, if it had appeared that the person making it had executed the deed in the name of the treasurer, as his deputy, we need not now decide. See *Ward v. Walters,* 63 Wis., 39, 22 N. W., 844. There was, in this instance, nothing to indicate that the instrument was

acknowledged by the person whose name was subscribed to it, nor did it appear from the certificate of acknowledgment or from the body of the instrument that it was executed by a deputy treasurer. We think that it was essential to the validity of the deed that it should have been acknowledged by the officer who executed it, and that that fact should have been manifest from the instrument itself. Since it did not so appear, the supposed deed was properly excluded.

As stated, there is no other objection urged against the judgment of the county court, and it is affirmed.

Affirmed.

[No. 3572.]

BURNHAM ET AL. *v.* GRANT ET AL.

1. WILLS—*Duty of Testator to Family.* A testator is under no duty to provide for collateral relatives. Even the parent may disinherit a child.

2. —— *Execution—Presence of Attesting Witnesses.* If in the act of attesting the will the witnesses are where the testator can see them if he desires, they are in his presence within the meaning of the statute. (Mills' Stat., Rev. Sup., 4664; Rev. Stat., Sec. 7071.)

3. —— *Request of Testator.* There is no requirement in the statute (Rev. Stat., Sec. 7071) that the testator should request the witnesses to attest the will.

4. PROBATE—*Contest—Competency of Witnesses.* Brothers and sisters of the devisee are competent witnesses to sustain the will. (Mills' Stat., Sec. 4816; Rev. Stat., Sec. 7267.)

5. —— *Credit of Witnesses.* The law does not impute to relatives of interested parties, testifying in a will contest, less integrity than other witnesses, but their testimony is received with caution.

6. —— *Letters of Testator.* Where contestants of a will alleged that the testator was of unsound mind and had been unable to transact business for years prior to the execution of the testament, letters of the deceased written during that period are admissible upon such issue.

7. —— *Letters of Contestant.* Self-serving letters of the contestant are not admissible in his behalf. (Rev. Stat., Sec. 7267.)

8. —— *Evidence—Experts' Testimony* is not entitled to greater weight than that of non-professional witnesses. The attention of the jury should not be specially called to it, either in the way of commendation or condemnation.

9. —— *Examination of Witness—Hypothetical Question.* A hypothetical question assuming facts not established by evidence, and which no evidence tends to establish, must be excluded.

10. NEW TRIAL—*Oral Testimony at Hearing.* Whether in considering a motion for a new trial oral testimony shall be received is in the discretion of the court. (Mills' Code, Sec. 217; Rev. Code, Sec. 236.)

11. APPEALS—*Harmless Error.* In a will contest a witness is exhaustively examined as to his impression of the mental condition of the testator. To exclude a question propounded on cross examination, as to whether, in his opinion, a matter spoken of in his testimony indicated a sound mind, is harmless.

Or to exclude testimony as to matters established by other testimony.

And error in the improper admission of testimony is cured by its subsequent admission without objection.

The refusal of an instruction given in other and better form is not error.

Or the refusal of an instruction directing the attention of the jury to particular evidence, when they are charged to consider all the evidence.

Appeal from Teller District Court. HON. W. S. MORRIS, Judge.

Mr. WILLIAM C. ROBINSON, for appellants.

Mr. HORACE N. HAWKINS, Mr. GUY P. NEVITT, for appellees.

A paper purporting to be the last will of one Frank J. Burnham was filed for probate in the county court of Teller County on the 7th of January, A. D. 1909. One Rebecca Nevitt, not of the blood of the testator, was named as sole devisee and legatee, and one A. W. Grant

as executor. Probate was opposed by the heirs at law of the decedent, alleging undue influence on the part of Grant, and that the decedent was of unsound mind.

The instructions given by the court, as mentioned in the opinion, after stating the issues, will be found in the margin.

HURLBUT, J., delivered the opinion of the court.

Action begun in Teller district court January 7, 1909. We have read with painstaking care the entire abstract of record, seven hundred pages. The record discloses a hotly contested controversy over the probating of a will, and we are not surprised to find the evidence decidedly conflicting upon the material issues. The law has imposed a duty upon the trial judge or jury of determining all issues of facts. That duty was performed in this case by a lawful jury, which decided the issues in favor of the proponents of the will. The verdict of the jury and decree of the court were to the effect that the paper or writing in controversy was the last will and testament of Frank J. Burnham, deceased.

It now becomes our duty to examine the record and ascertain therefrom whether or not any reversible error was committed by the trial court in the proceedings before it.

Appellants (contestors) in their petition allege that the writing was not the last will and testament of the testator; that at the time of its signing testator was in a dying condition, unconscious, irrational, and unable to know and understand the contents or purport of the same; that he never became conscious or rational after the said writing was prepared and presented to him, and if he did sign such writing he did so by reason of persuasion, arguments, physical effort, and undue influence of other persons; that he was not at the time of sound mind and memory, and had not been of sound mind and memory for several years prior to that time.

The answer of appellees (proponents) formed issue upon each of the above allegations. As to the truth of such allegations the verdict of the jury indicates they were not sustained. Some thirty witnesses testified, but no good purpose would be accomplished by separately commenting on their testimony. There is sufficient evidence to support the verdict. A verdict for contestors could be equally sustained by the evidence.

Frank J. Burnham, the testator, left surviving him as sole heirs at law, a brother living in California and sister living in New Hampshire. The evidence tends to show that from early in 1902 up to February 24, 1909, the testator had been living continuously with the Nevitt family at Florissant, Colorado, and during all that time had been treated by them as though he were a member thereof; that he was of an advanced age (68 years) and was seriously crippled by reason of an accident which had resulted in a broken leg; that for about nine or ten months after he joined the family he used a cane in walking, and was incapacitated by reason of the accident from performing any physical labor of moment; that while living with the family he was ill a number of times, sometimes being confined to his bed; that during such illness his meals were provided for him and generally taken to his sick chamber by Mary Rebecca Nevitt, the devisee; that during all of the six years residence with the family he at all times was treated with kindness and consideration by the various members thereof, was furnished by Mary Rebecca Nevitt and her husband with food, shelter and necessary clothing, and at times with modest amounts of money; that some time after joining the family testator volunteered to work for Mr. and Mrs. Nevitt (who were at that time conducting a hotel); that he cut and carried wood, carried water, went on errands, and performed other services of like nature in and about the hotel; that two or three months before testator's

death the hotel occupied by the Nevitts was burned to the ground, after which they occupied other houses in Florissant, but he continued to make his home with them in their new abodes; that testator at all times spoke in kind and appreciative terms of the Nevitts, particularly of Mary Rebecca Nevitt, often addressing her as "Aunt Nevitt," or "Aunt Becky"; that during his entire residence with the family the utmost harmony and friendship existed between them and the testator; that testator at different times had stated to disinterested persons that the Nevitts' domicile was his only home, and they would get what little he had in case anything happened to him; that the only moneys received by testator during his six years' residence with the Nevitts was about $400, and at his death he had in his possession about $75; that prior to the time he joined the Nevitts he received $2,000 from the sale of his ranch, but lost the same in ill-advised investments; that during his entire residence with them he received no moneys or support from either his brother or sister with the exception of a dollar or so sent him by his sister at Christmas time on several occasions; that before joining the Nevitts he was in the county hospital under treatment for the accident mentioned; that testator was of the impression that his brother did not care much about him, and was not much interested in what he did, or what his condition was; that his sister was not very much interested in his welfare; that the executor, Grant, at the request of testator, wrote the will and read the same to him before it was signed, and that shortly after testator signed the will May Horrigan had a conversation with him in which he gave her the names and addresses of his brother and sister, and stated he did not want her to telegraph them at that time, as he thought he would be better in the morning. The evidence further tends to show that testator's mental faculties were normal at the time, and for a considerable

period before the will was signed, and that he knew he was devising all his property to Mary Rebecca Nevitt, and thus disinheriting his brother and sister. We are unable to find anything in the record showing that Mr. Grant, Mary Rebecca Nevitt, or anyone else, used any undue influence to induce him to sign the will, or any physical or other force to compel him to do so. The evidence does not suggest moral turpitude on the part of Grant, or any of the Nevitts, by reason of anything done or said by them concerning the making and execution of the will. We do not overlook the fact that at and just prior to the time the will was signed by the testator, the five persons around his bedside were all relatives of the devisee, Mary Rebecca Nevitt. It is reasonable to presume this fact was impressed upon the minds of the jury in argument. They were authorized to, and probably did, scrutinize with caution the testimony of such relatives bearing upon the circumstances surrounding the execution of the will. Under such circumstances the law does not impute to relatives or interested witnesses less honor or integrity than that possessed by other classes of witnesses. Experience, however, has taught that such witnesses are more prone to be influenced by their personal interests or kindred ties, in giving testimony, than would be the case if they were entirely disinterested or indifferent witnesses. Courts generally direct an attentive ear, and give vigilant attention, to testimony of such witnesses, and are quick to detect fraud or undue influence if suggested by evidence adduced at a judicial inquiry into executions of wills. If impressed that bad faith is shown, they will promptly interpose and prevent the threatened wrong. There is no more shocking fraud known in human affairs than that effectuated by inducing one to convey or will away his property against his will or consent, while under the influence of artifice, un-

lawful persuasion, or duress practiced upon him by those who profit thereby.

Counsel suggests that it was the duty of the testator to will his property to the brother or sister, instead of to a stranger. We cannot assent to this. There may exist in man a natural inclination to will his property to relatives rather than to strangers, but this inclination is frequently removed by circumstances surrounding the testator. It is common knowledge that the blood tie between brother and sister is not as binding as that between parent and child, or the tie between husband and wife. Even then a parent may lawfully disinherit his own child if he chooses, and a husband or wife may disinherit the other to the extent of one-half of all his or her estate. It is not an unreasonable presumption in the light of this record, that the testator in executing this will may have been influenced by gratitude and appreciation in devising his property to appellee, Mary Rebecca Nevitt.

Ninety-nine assignments of error appear in the record. Appellants' counsel contends that the trial court committed reversible error in permitting Melvin, Daniel, Guy and Minnie Nevitt (Mrs. Grant) to testify at the trial on behalf of proponents, on the ground that they were interested witnesses under the statute. We think they were competent to testify under Sec. 4816, Mills' Annotated Statutes.—*Butler v. Phillips,* 38 Colo., 378, 88 Pac., 480, 12 Ann. Cas., 204; *White, Admr., v. Christopherson,* 46 Colo., 46, 102 Pac., 747; *In re Hatfield's Will,* 21 Colo. App., 443, 122 Pac., 63. In the latter case it was held that the wife of the legatee was a competent witness.

Appellants also complain of the action of the trial court in refusing, on its own motion, to allow the witness Kessel to answer the question propounded on cross-examination, viz.: "Do you think that indicates a bright

man or a man of sound mind and memory?'' If there was any error in this action of the court it was harmless, for the reason that the witness was exhaustively interrogated both on direct and cross-examination concerning his impressions of the mental condition of deceased. Without further discussion of the rulings of the court in rejecting or admitting testimony, raised by many other assignments of errors, we are satisfied that no reversible error was committed, and that no substantial rights of appellants were invaded by such rulings. In many instances the facts sought to be elicited by the excluded interrogatory were brought out by other testimony admitted, while again facts disclosed by evidence admitted over objections of appellants were shown by other admitted evidence where no objection was interposed.

Error is also claimed by the admission in evidence of certain letters written by the testator to Guy P. Nevitt, his attorney, which letters were written between July 9, 1906, and testator's death. The letters were competent evidence under the issues that testator had not been of sound mind and memory for several years prior to the time he signed the will, and that for several years prior thereto his mind and memory were so weak and unsound that he was not fit or competent to fairly, safely or properly care for or preserve his property or transact business. The jury were entitled to consider the contents of these letters concerning such issues for what they were worth as proving or disproving a weak and unsound mind, or the testator's incompetency to transact business, etc.—*In re Shapter's Estate,* 35 Colo., 578, 85 Pac., 688, 6 L. R. A. (N. S.), 575, 117 Am. St., 216.

Under the 35th assignment of error appellants vigorously assert the invalidity of the will, on the ground that it was not attested in accordance with the statute, Sec. 4653, Mills' Annotated Statutes, and Sec. 4664, Revised Supplement. If witnesses, when signing a will,

are in such a place that the testator can see them, if he chooses, they are in his presence, within the meaning of the statute.—*Ombre v. Weishaar,* 74 Ill., 109. The evidence shows that the testator suggested that Melvin Nevitt and May Horrigan be witnesses to his will, and also shows that when the will was attested by the two witnesses they were in his presence, and that he was in a position to see them and what they were doing.

In the 62nd and 63rd assignments of error appellants claim that it was error in the court to exclude from evidence Exhibits 19 and 20, being letters purporting to have been written by F. R. Burnham, one of the contestors, to J. B. Severy. Objection was made on the grounds that the same were not sufficiently identified, were written by one of the parties to the suit, etc. We think the objections well taken. The witness Robinson did not purport to testify that he knew the signature or handwriting of the author of the letters, or that they were written or signed by such author. As we read the record, proper identification was wanting. On the second ground they were inadmissible as self-serving statements made by one of the parties to the suit, such party being specifically disqualified by the statute.—Mills' Annotated Statutes, Sec. 4816; *Butler v. Phillips, supra; In re Shapter's Estate, supra.*

We have carefully examined the record as to the rulings of the trial court in excluding from evidence the hypothetical questions propounded to the physicians. All such questions but one included substantially this language: "If one suffering from pneumonia lay in bed on his back from noon or 1:30 p. m. with his eyes and mouth open, his face purple, his pulse about 145, gasping for breath, paying no attention to anything or any person, except to answer a question when asked, *and that condition continues until between* 5:30 *and* 6:00 *o'clock,* what would you say," etc. There is no evidence to show

such a state of facts. The only testimony which could be considered as tending to show such to be the condition of testator was that of May Horrigan and Mr. Allen. But under the most liberal analysis of their testimony it falls far short of showing such facts. Neither of them pretends that he or she was in the presence of the testator all the time from 12 or 1:30 o'clock until 5:30 or 6 o'clock of that day. Their testimony shows they were present only a short portion of that period. The law seems to be settled that the hypothesis stated must be founded on evidence which either proves or disproves, or tends to prove or disprove the same, and that if the assumed facts are not supported by some evidence tending to establish them the question is improper and should not be propounded.—*Gottlieb v. Hartman,* 3 Colo., 53; *Jackson v. Burnham,* 20 Colo., 532, 39 Pac., 577.

Appellants requested seventeen instructions to be given to the jury, all of which were refused, and error is predicated thereon. Of the instructions so refused, 1, 2, 4, 10 and 16 are abstract statements of law upon the question of insanity and insane delusions, and in so far as they purport to guide the jury in deciding the mental capacity of the testator they are not so helpful as given instructions numbered 5, 6, 9 and 10. The instructions so given pertain to the same subject-matter as those refused, and by their phraseology more clearly interpret the law with reference to the facts disclosed by the evidence. The instructions so given appear to have been carefully considered, and are supported by reputable authority.*

Redfield on Wills, vol. 1, p. 121, paragraph 11; *Trish et al. v. Newell et al.,* 62 Ill., 196, 14 Am. R., 79; *Schneider*

*The instructions given below are as follows:

3. It is provided by statute that every person, aged twenty-one years, if a male, or eighteen years, if a female, being of sound mind and memory, shall have the power to devise all the estate, right, title

v. Manning, 121 Ill., 376, 12 N. E., 267; *Huggins v. Drury,* 192 Ill., 528, 61 N. E., 652. We see no serious objection to refused instruction number 6, which told the jury that, in determining the mental condition of the testator at the time he made the will, they could consider the evidence as to his condition both before and after that time as tending to establish a probability that his mind was unsound at the time the will was executed. However, it appears to us that refusing the instruction, if error at all, was harmless. The court permitted a wide latitude in showing testator's acts and mental condition, both before and after the will was made. The jury were instructed that they should consider all the evidence in arriving at their verdict. Under those circumstances we do not think the failure to specially instruct the jury that they could consider evidence of all facts existing both before and after the time the will was

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and interest in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents charged upon or issuing out of them, or goods, chattels and personal estate of every description whatever, by will or testament.

A will, to be valid, must be in writing and signed by the testator, or by some one in his presence and by his direction, and attested in the presence of the testator by two or more credible witnesses. An attesting witness is one who subscribes his name to a will as a witness to its execution, at the request of the testator.

4. If Frank J. Burnham signed the instrument in question in the presence of Melvin L. Nevitt and May Horrigan, who were in the same room with the said Frank J. Burnham and only a few feet from him, with the view between the said Frank J. Burnham and the said Melvin L. Nevitt and May Horrigan uninterrupted, and the said witnesses at the time within the range of the vision of the said Frank J. Burnham; and if the said Frank J. Burnham, taking into account his then condition or state of health, and his then position, as shown by the evidence, either saw, or could have seen, if he had wished to, and had looked in the proper direction, the said witnesses, and enough of the act then being done by them, to know on his part from what he

made was prejudicial to contestors. Refused instruction number 8, telling the jury they might give more weight to expert testimony than to that of non-professional witnesses, was rightfully rejected. An imposing array of authority lays down the rule that expert testimony is to be considered the same as any other, and that the jurors' attention should not be called specifically to such testimony, either in the way of discrediting it or giving it undue prominence.—Brickwood's Sackett on Instructions, Vol. 1, Sec. 126; *Rivard v. Rivard,* 109 Mich., 98, 66 N. W., 681, 63 Am. St., 566; *Blough et al. v. Parry et al.,* 144 Ind., 463, 40 N. E., 70, 43 N. E., 560. Refused instruction number 14 instructs the jury, among other things, that if the testator did not *request* both witnesses to sign the will their verdict should be for contestors. This is not the law. The statute, Sec. 4653, Mills' Anno-

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so saw, or might have seen if he had wished, and from what he knew of the then surrounding circumstances, that the said Melvin L. Nevitt and May Horrigan were then signing their names as witnesses to the said instrument in writing, as the will of the said Frank J. Burnham, then upon that question you should find the alleged will in question to be properly attested.

5. It is only requisite that the said Frank J. Burnham at the time of making his will should be of such sound mind and memory as to enable him to know and understand the business in which he is engaged. It is not necessary that he should be in the full possession of his reasoning faculties. It is only necessary that the testator should have mental capacity sufficient for the transaction of the ordinary affairs of life, and possessing these, though he may have been feeble in mind and body from sickness or old age, he had the legal right to dispose of his property just as he pleased, without consulting either his family or acquaintances. If at the time he signed the paper in dispute, he had mind and memory sufficient to transact his ordinary business, and when he made the will he knew and understood the business he was engaged in, then you should find the said paper writing to be his will.

6. A person, in order to make a valid will, should be of sound mind and disposing mind and memory. What is meant by soundness

tated Statutes, only requires that the will be "attested in the presence of the testator or testatrix, by two or more credible witnesses." There is no requirement that such witnesses shall attest the same upon request of the testator.—Rood on Wills, Sec. 289. We have given careful consideration to the other instructions refused by the court, and are satisfied that no prejudicial error was committed in refusing them. Some of them might have been properly given, while others were subject to criticism as not fully and clearly stating the law as applicable to the facts disclosed by the evidence. On the whole, their subject-matter was included within the language of the instructions given.

Twelve instructions were given by the court, and appellants assign error upon all thereof except the first three. Those numbered 5, 7, 9 and 11, however, are not

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in this respect is not that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order, so to speak, with an active power to collect and retain the elements of the business to be performed for a sufficient time to perceive their obvious relations to each other. The term "sound mind," "does not mean that the testator shall have the same command of his mental faculties that he may have when in health. Wills are often made when the bodily powers are broken and the mental faculties are enfeebled, and it is only required that the testator shall retain so much of his mental power as will enable him to understand his relations to those who would be the natural objects of his bounty and the property he wishes to distribute and the manner in which he intends to distribute it. A person of sound mind and memory is one who has full knowledge of the act he is engaged in, and of the property he possesses, an intelligent understanding of the disposition he desires to make of it, and of the person or persons he desires to receive his property and the capacity to recollect and apprehend the nature of the claims of those who are excluded from participating in his bounty. It is not necessary that he should have sufficient capacity to make contracts, to do business generally, or to engage in complex and intricate business matters; and if the said Frank J. Burnham, at the time he signed the paper writing in question, did not have such knowledge, as above defined in this instruction, and did not possess

seriously urged as error. Instructions numbered 4 and 6; as to the facts concerning the attestation of the will, and mental condition of the testator at that time, respectively, are supported by authorities hereinbefore cited, as well as the following, viz.: *Freeman v. Easly,* 117 Ill., 317, 7 N. E., 656; *Blackman v. Edsall,* 17 Colo. App., 429, 68 Pac., 790; Cyc., Vol. 40, p. 1007. Instruction number 8, concerning undue influence, is an unobjectionable statement of the law on the subject.—*England et al. v. Fawbush,* 204 Ill., 384, 68 N. E., 526; *Webber v. Sullivan et al.,* 58 Ia., 260, 12 N. W., 319. We read nothing in *Blackman v. Edsall, supra,* which is opposed to the principle declared in the instruction. No authority is produced by appellants to sustain their objection to instruction number 10, upon the question of insane delusion. On the contrary, it is well supported

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such understanding as to the disposition he desired to make of his property, and of the person he desired to receive the same, and did not have capacity to recollect and apprehend the nature of the claims of those who were excluded from participation in his bounty, then he would not be of sound mind and memory within the meaning of the law; but if, on the other hand, at the time the said Frank J. Burnham signed the paper writing in question, he had such knowledge as above defined in this instruction, and possessed such understanding of the disposition he wished to make of his property, and of the person he desired to receive the same, and had capacity to recollect and apprehend the nature of the claims of those who were excluded from participating in his bounty, then he would be of sound mind and memory within the meaning of the law, even if you may believe from the evidence that he was physically weak and did not have mental capacity sufficient to make contracts, to do business generally, or to engage in complex and intricate business matters.

7. A will proved or admitted to have been executed and attested, as prescribed by law, will be presumed to have been made by a person of sound mind; but if testimony is shown which counterbalances that presumption, the party seeking to support such will must establish by affirmative evidence to the satisfaction of the jury that the testator was of sound mind when the will was executed.

Ordinarily, where a will is in proper form, signed by the testator,

by *Petefish v. Becker,* 176 Ill., 448, 52 N. E., 71. We repeat that we are satisfied from a careful consideration of all the evidence that the instructions given by the court, when taken as a whole, impartially and fairly state the law upon the various phases of the case, and as to instructions refused, when considered in the light of all the evidence adduced, no substantial rights of contestors were prejudiced by refusing same. The following excerpts are applicable:

"The refusal of instructions, which, though containing correct propositions, could not, in view of all the facts developed by the evidence have prejudiced the party complaining, will not operate to reverse the case."—Sec. 190, Vol. 1, Brickwood's Sackett on Instructions.

"Upon looking at the instructions given, we find them to be consistent with each other. They must, there-

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and attested by attesting witnesses, the presumptions are in favor of testamentary capacity, due execution, and that the will contains the unrestrained wishes of the testator; and the burden abides with the party attacking the will to show improper execution, lack of testamentary capacity, or undue influence.

8. Where undue influence is relied upon to set aside a will, the question to be decided is, did the testator make and execute the alleged will in all its provisions of his own free will and volition, so that it now expresses his own wishes and intentions, or was the testator constrained or induced through the undue influence, restraint, coercion or improper conduct of others, to act contrary to his own desire and intentions regarding the disposition of his property, or any part of it? In order that one contesting a will may prevail, it is necessary to show by the evidence that undue influence was in fact exerted over the party making the will, and that it was successful in subverting and controlling the will of the party making the will. Both of these facts must be proven by the contestants by the weight of the evidence in order to defeat the will.

9. If said Frank J. Burnham, on the day he made the alleged will, was suffering on account of disease, or that his mental faculties were obscured by the disease from which he was suffering, still this would not necessarily prevent his having sufficient capacity to make a

fore, be considered together; and if, as a whole, they fully and fairly submitted the questions involved to the jury, we do not see that the defendant has any ground of complaint."—*Hindry v. McPhee,* 11 Colo. App., 398, 53 Pac., 389.

To the same effect, *Davis et al. v. Shepherd,* 31 Colo., 141, 72 Pac., 57.

Appellants next complain that the court erred in not receiving oral testimony at the time the motion for new trial was under consideration. There was no error in such ruling. The supreme court in *Schoolfield v. Brunton,* 20 Colo., 139, 36 Pac., 1103, has settled the question by holding that the matter of receiving oral testimony in addition to the affidavits required by Sec. 217, Mills' Annotated Code, is within the discretion of the trial court. The record does not suggest an abuse of this discretion.

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will. The obscuration of the mental faculties by disease must have so beclouded the mind that the testator does not understand the nature of the business in which he is engaged, or does not understand at the time of making the instrument, substantially the act, the extent of his property, his relations to others who might or ought to be the objects of his bounty, and the scope and bearing of the provisions of the will, and does not possess the other qualifications which are mentioned in these instructions.

10. An insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe. Such delusions may sometimes exist as to one or more subjects. To sustain the claim of the contestants that Frank J. Burnham was laboring under the insane delusion in regard to the relation and temper of his brother and sister toward himself, it is not sufficient to show that he had a suspicion to that effect, or that his suspicion was not well founded. Although he may have had groundless and unjust distrust with reference to the feeling of his brother and sister towards himself, yet such doubt does not establish a condition of lunacy, or the lack of testamentary capacity, unless it appears from a preponderance of the evidence that such distrust caused him to execute a will he would not otherwise have made. The right of the testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and if there

Appellants further insist that the trial court erred in not granting a new trial based upon the alleged drunkenness of one of the jurors. This charge was supported, as well as controverted, by many affidavits. The court found that "the grounds respecting the drunkenness of the juror Keegan were not well founded." This issue, like all others contained in the motion for new trial, was to be decided by the court in the exercise of sound judicial discretion. *Jones v. The People,* 6 Colo., 452, 45 Am. R., 526; *May v. The People,* 8 Colo., 210, 6 Pac., 816, and *Repath et al. v. Walker et al.,* 13 Colo., 109, 21 Pac., 917, are in point and seem to be ample authority for the court's ruling on this question.

Under assignment of error number 99, appellants challenge the form and validity of the decree, but cite no authority to sustain their reasoning. We are unable

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is no defect of testamentary capacity, his will should be sustained, though its provisions are unreasonable or unjust.

11. You are the judges of the credibility of the several witnesses who have appeared before you, and of the weight or importance to be given to their respective statements or evidence. In passing upon these matters you may take into consideration the interest, if any, the witnesses may have in the result of this trial, their conduct upon the witness stand, their intelligence or want of intelligence, their candor or want of candor, their means of knowledge of the facts to which they have testified, any bias that they may have shown in their evidence, and from all the facts and circumstances occurring at the trial, determine which witnesses are the more worthy of credit and give credit accordingly, and give the evidence of each witness such weight as you shall deem it justly entitled to. If any witness has wilfully and corruptly testified falsely concerning any material matter in this case, you are at liberty to disregard the whole or any portion of the evidence of such witness, except in so far as such evidence is corroborated by other credible evidence.

12. As to any argument, statement or objection made to the court, or to the other counsel by counsel of either party, or any remark, decision or order made by the court, and not made to the jury for their consideration in the matter during the progress of this trial, it is not a matter for your consideration in this case, and should not

to discover any material error in the form of the decree. Its substantial recitals are supported by evidence and the verdict of the jury.

The record here shows, on the one hand, that the testator, at the time he made the will, had a brother and sister living in this country; that his sister possessed an abundance of love and affection for the testator, and the brother a kind and considerate feeling towards him; that some years before his death they donated to the testator their interest in a certain ranch which he afterwards sold for some $2,000; hence, whatever feeling of hostility, if any, which the testator might have entertained against them, was unfounded. On the other hand, the evidence discloses a man of advanced age, seriously crippled and disabled from a broken leg, entering into the family circle of the Nevitts at Florissant; that for many months after joining them he was not able to do any physical work of moment, and during such time was penniless, without home or habitation other than that provided by his benefactors; that a portion of such time he was ill, but received from them shelter, food and kind attention, particularly from the legatee, Mary Rebecca Nevitt; that for about six years he remained with them, and after they

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in any way enter into your deliberation, consideration and determination of this case; that neither by these instructions, nor by any words uttered, or remark made by the court during this trial does or did the court intimate, or mean to give, or wish to be understood as giving an opinion as to what the proof is or what it is not, or what the facts are in this case, or what are not the facts therein. It is solely and exclusively for the jury to consider, weigh and determine the facts, and this you must do from the evidence, and, having done so, then apply to such facts the law as stated in these instructions. The instructions given to the jury are and constitute a connected body and series, and should be so regarded and treated by the jury; that is to say, you should apply them to the facts as a whole, and not detached or separated, any one instruction from any or either of the others, as no one of these instructions contains all the law governing this case.

had lost their entire household possessions by a destructive fire they still maintained this old man within the family circle, giving him such care, support and attention as their financial condition would warrant. Many disinterested witnesses testified to the kind and appreciative declarations of the testator regarding his benefactors, in which he repeatedly asserted that the only home he had was with the Nevitts; that they were his true friends, etc. They also testified as to the harmonious and friendly relations existing between testator and the Nevitts during all those years. Under these circumstances it does not appear strange or unnatural that the testator might have decided in his closing hours to will his estate to his benefactor, Mary Rebecca Nevitt. There was no legal, and possibly no moral, duty, under this situation, requiring him to will his property to his brother or sister.

We have endeavored to give this case most careful consideration, and have examined every assignment of error, but have noticed only, in this opinion, those we deem the most important. Upon a full consideration of the entire record we cannot say there has not been a fair and impartial trial. Neither do we discover anything in the record which justifies an inference that the trial judge was governed by improper motives, or displayed, at the trial, any bias or prejudice, for or against, any of the parties or attorneys, or that the jury did not act honestly and impartially in rendering their verdict. The judgment is affirmed.

Decided May 12, A. D. 1913. Rehearing denied June 10, A. D. 1913.

[No. 3618.]

W. H. PEEPS FIXTURE CO. v. GOVE.

1. JURY—*Rule of Court Denying.* A rule of court requiring that every notice to set a cause for trial shall state whether a trial to the court

or to a jury is demanded, is not to be so construed and applied as to deny a trial by jury where the party is entitled to it. Defendant in an action at law, who, being served with a notice, under the rule, not indicating whether the case is for a jury or not, must be allowed a trial by jury, if he applies for it seasonably. Even delay in the application occasioning inconvenience to the other party, or to the court, is not sufficient to warrant a denial of the constitutional right to a jury. The application should be granted, terms being imposed if the ends of justice require.

2. BILL OF EXCEPTIONS—*When Necessary.* Statements in the brief will not be accepted as evidence of a rule of the court below.

Appeal from Denver District Court. HON. HARRY C. RIDDLE, Judge.

Mr. GOBIN STAIR and Mr. ARTHUR PEARSON, for appellant.

Mr. GEORGE P. STEELE, for appellee.

CUNNINGHAM, Presiding Judge.

Appellee Gove, as plaintiff below, recovered judgment in the district court against the Peeps Fixture Company, appellant, on a promissory note which it was alleged was executed by the Fixture Company, and delivered to one Frazier, who assigned the same to plaintiff. The answer sets up several defenses, but, in the view we take of the case, it is not necessary to give any particular consideration to these defenses, or to the defects therein. The answer stated a good defense; indeed, it is not contended on behalf of plaintiff that it did not do so.

Under the pleadings and the evidence the case was clearly one for a jury, but the defendant was denied the right to a jury trial, said denial being based upon the following facts, so far as we are able to glean them from the record: On the 20th day of November, 1909, the plaintiff's counsel served written notice upon defendant's counsel that he would ask to have the case set down for trial. Defendant's counsel signed a receipt for a copy of the notice, or indicated thereon that he had received a

copy of the same, on the date last aforesaid. The case was set down for trial on December 8, 1909. On December 2, six days before the trial, counsel for defendant filed a motion asking that the order setting the case for trial on December 8 be vacated, and that an order be entered setting the case for trial at the convenience of the court, but at a time when the jury was in attendance. In his motion defendant's counsel specifically demanded and insisted upon the right of his client to a jury trial. The court took this motion under advisement, and did not rule thereon until the date of the trial, December 8, when it denied the motion. Upon the overruling of defendant's motion the following colloquy occurred between the court and the counsel for defendant, which we quote without abridgement:

"The Court: Under a rule of this court, when notice is served setting a case for trial upon its merits, the rules of the court require that the notice shall indicate whether it is a trial to the court or a trial to a jury, and if the notice doesn't indicate whether it is a trial to the court or a trial to a jury, and if the notice doesn't indicate on the part of the counsel serving the notice upon counsel receipting for the notice, it is set for trial to the court.

"Mr. Stair [Attorney for Defendant]: The defendant excepts for the reason that the original notice had no indication as to whether or not a jury would be asked for; that counsel for the defendant was not aware of a rule of court to that effect, and in order to remedy the error put in a specific motion (six days before the trial) for a jury.

"The Court: The rule to which the court has called counsel's attention is printed and published in the rules of this court, and you are bound to take notice of them."

All that we know with reference to the rule of the trial court referred to is what appears in the colloquy

just quoted, from which it would appear that there was a rule of the Denver district court requiring that all notices to have cases set should indicate whether the case required a trial to the court or a trial to the jury, and if the notice did not so indicate (and the notice in this case did not, apparently), then it would be assumed by the trial judge that it was a trial for the court, and the case would be set down for trial accordingly. If the rule of the district court has been correctly stated, and we must so assume, since no objection is taken on this point, then it is within the power of the attorney who serves notice upon his opponent to force the case to be tried without a jury, simply by omitting from the notice any statement with reference to whether the case was or was not a jury case. We think it is too clear for argument that such a rule is more honored in the breach than in the observance. Courts are not made for rules, but rules are made for the courts and for litigants appearing therein. It might have been the duty of defendant's counsel when this notice was served upon him to immediately demand a jury, instead of delaying until six days before the case was called for trial, but, according to the rule as stated by the court, his demand would have been just as unavailing if made immediately upon receipt of the notice, as it was held to be when he made it a full week in advance of the trial. If the court had reason to believe that the delay of counsel for defendant in making his demand for a jury had occasioned the other side, or the court, any inconvenience, still his motion could have been, and we think ought to have been, granted, terms being imposed if the ends of justice so required. The suit, however, was brought upon a promissory note. The record discloses that the plaintiff had no witness whatever at the trial save himself. The slight dereliction of the defendant's counsel, under such circumstances, on a matter of no more importance,

is not sufficient to warrant a denial of the constitutional right of the defendant to a trial by jury.

There are other matters discussed in the brief, to which we shall not allude; our silence, however, must not be construed as indicating that we found no other error in the record than that to which we have already adverted.

The judgment is reversed, with leave to either party to amend their pleadings as they may be advised.

Reversed and Remanded.

On rehearing:

Counsel for appellee in his brief on petition for rehearing challenges the accuracy of the statement of the trial judge concerning the rule of the district court referred to in the original opinion, and in his brief sets forth what purports to be the rule in full. As stated in the original opinion, our only knowledge of the rule of the district court was what appeared in the abstract. Indeed, there was no other proper source of information to which we could resort. Counsel for appellee, with commendable frankness, admits that if the rule of the district court had been as stated by the trial court our condemnation thereof was warranted. Without intending or meaning to impugn the good faith of counsel for appellee, we cannot consider the rule of the district court as set forth by him in his brief on rehearing as though the same had been established by competent proof on the trial. We cannot consider for evidentiary purposes that which is called to our attention for the first time by brief. But if we were to accept the rule as stated in the brief, and treat it as though it were properly before us for our consideration, we are still disposed to think that the trial court erred in refusing to grant the request of defendant for a jury trial. The last clause of the rule itself, as it appears in appellee's brief on rehearing, reads as follows:

"Whenever it shall appear to the court that any case in which a jury trial has been waived ought properly to be tried by a jury, the court may direct that the case shall be tried to a jury, in which event the case may be continued to a time when the jury is present, and trial shall proceed in all respects as though the jury had not been waived."

As stated in the original opinion, this case was one pre-eminently for a jury. The defendant clearly had not intentionally waived its right to a jury. The waiver, at best, was but an oversight on the part of its counsel, due to his lack of familiarity with the rules of the trial court. We think the trial court abused its discretion in this case in arbitrarily enforcing a waiver thus unwittingly and unwillingly made. Nor can we yield assent to counsel's contention that the application and enforcement of the rule in question by the trial court, under the circumstances disclosed by the record in this case and referred to in the original opinion, deprived the defendant of no substantial right, for the right of a trial by jury is universally regarded as an important one.

Rehearing Denied.

Decided April 14, A. D. 1913. Rehearing denied June 10, A. D. 1913.

[No. 3586.]

EMPIRE RANCH & CATTLE CO. v. HOWELL.

The case ruled by *Empire Co. v. Howell*, 22 Colo. App., 584.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

MORGAN, J.

Appeal from a judgment of the district court of Washington county for the possession of a quarter-sec-

tion of land and setting aside a tax deed relied upon by the defendant.

The contentions of appellant on this appeal have been heretofore decided against it, in the case of *Empire Ranch & Cattle Co. v. Lardner Howell,* 22 Colo. App., 584, 126 Pac., 1096, wherein this court held that:

"The legal title of a mortgagee or grantee in a deed of trust to secure a debt is recognized only for the benefit of the holder of the debt; but against all other persons the mortgagor or grantor is the legal owner, and the title of the mortgagor or grantor remains until divested by sale under proceedings regularly brought."

"To establish title by limitations to vacant and unoccupied land, one must have color of title, obtained in good faith, and must pay taxes for the full period of seven years, and the color of title and payment of taxes must exist concurrently without interruption, and must continue throughout seven years; and seven full years must elapse between the first payment of the taxes and the commencement of an action against him, to establish the defense of limitations."

The judgment of the lower court is therefore affirmed. *Affirmed.*

[No. 3589.]

SCOTT v. HOWELL.

1. APPEALS—*Objections Not Taken Below*, are looked upon with disfavor, *e. g.*, a general objection to the complaint for want of a sufficient statement of facts, not calling attention to particular matters proven but not alleged.

2. —— *Harmless Error.* The omission from the complaint of a fact which was proven below without objection will be disregarded.

3. PLEADINGS—*Certainty.* A complaint in an action to remove a cloud from a title, assailing a tax deed, should point out the precise defects in the proceedings which are complained of.

But the lack of particularity in this respect is to be met by a motion to make more specific.

4. TAX TITLES—*Removing Cloud From Title—Offer to Refund Taxes.* Failure to tender a return of the taxes paid by defendant is waived by an answer claiming title under the tax deed.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

MORGAN, J.

Appeal from a judgment for plaintiff in an action to remove a cloud from title, annulling a tax deed, and removing the cloud created thereby from the title, to two half-sections of vacant and unoccupied land.

Appellant contends that the complaint did not state facts sufficient to constitute a cause of action, because it did not allege that the tax deed was recorded, because the allegations attacking the tax deed were mere conclusions of law, and because the complaint did not contain an offer to refund the taxes paid by defendant.

It is true, it was not, although it might have been truthfully, alleged that the deed was recorded. However, plaintiff's testimony disclosed that the deed was recorded, and such proof was made without any objection being interposed that pointed out this specific defect in the complaint, although objection was interposed that the complaint did not state facts sufficient to constitute a cause of action. Furthermore, defendant's counsel, in his objection, stated that "it is alleged in the complaint and admitted in the answer that the deed was made on the 6th day of March, 1899, and recorded on the same day in Book 1299, page 213, of the said records." This statement of counsel discloses that the case was tried as though it had been alleged in the complaint that the deed was recorded, and it discloses, also, that counsel could not have had in his mind at the time he made the objection the lack of this particular allegation. His objections

also were specifically stated to be concerning the want of sufficient allegations as to the reason why the affidavit of publication was not made as provided by law, and to the lack of any offer in the complaint to pay or refund the taxes to defendant which he had paid. If this defect had been sufficiently pointed out to the court, an amendment could have been inserted in the complaint, that the deed had been recorded, so as to make the pleadings correspond to the proof. If this cause should be reversed, the amendment could be allowed, and nothing would be gained by appellant, and we think this defect in the complaint, if it was not cured, should be disregarded. Although the objection that a complaint does not state facts sufficient to constitute a cause of action may be raised at any time, yet when the specific objection is first pointed out on the appeal, the view of the supreme court in the following cases that, such objection, when first made in the appellate court, is looked upon with disfavor, is applicable: *Insurance Co. v. Bonner,* 24 Colo., 220, 222, 49 Pac., 366, and cases cited; *Colo. F. & I. Co. v. Four-Mile R. Co.,* 29 Colo., 90, 66 Pac., 902.

It is true, also, that the complainant, in attacking the tax deed, after stating a number of things that were not done, and which the statute requires, leading up to the issuance of the deed, followed such allegations with the statement, "as required by law," but the allegations of facts were sufficient without the words quoted, which the appellant contends is a conclusion of law. The complaint should have stated and pointed out the exact defects in the proceedings, but the defendant did not interpose any motion to require such statements to be made more specific.

It is true, also, that the complaint did not contain an offer to refund the taxes paid by the defendant; however, the defendant admitted and alleged that he claimed to be the owner of the premises, by virtue of the tax deed, at-

tacked, and consequently such offer would have been unavailing.—*Empire Ranch & Cattle Co. v. Lanning,* 49 Colo., 458, 461, 113 Pac., 491, and cases cited.

All other assignments of error have been disposed of contrary to appellant's contention by recent decisions of this and the supreme court.

The judgment of the lower court is therefore affirmed.

Affirmed.

[No. 3627.]

IRWIN ET AL. v. BEGGS.

1. EXECUTION—*Improvidently Issued—Or Upon Void or Satisfied Judgment—Remedy.* An execution issued upon a void judgment or one which has been satisfied, in whole or in part, or an execution improvidently issued for any reason, may be quashed upon motion in the court from which it issues.

2. —— *Injunction.* But where complicated questions of law or fact, such as can be properly tried only upon appropriate pleadings, are involved, equitable relief may be obtained by an original suit, and the execution may be enjoined.

Irwin recovered judgment against Beggs in the county court, levied execution upon certain lands, and purchased the same in partial satisfaction of the judgment. Third parties afterwards contested his title and prevailed in such contest. Beggs was not party to the latter proceeding. Irwin afterwards took execution for the full amount of his judgment and levied upon personal property of Beggs. Beggs without any application to the county court, brought his bill in the district court to restrain proceedings under the latter execution. The record presented the following questions. (1) Whether Irwin's purchase of the lands under the first execution estopped him to proceed for the full amount of his judgment; (2) whether by the judgments recovered by third persons against Irwin, quieting the title, and so obliterating his purchase on execution, Beggs was estopped to show that at the time of Irwin's levy, he (Beggs) had in fact an interest in the land, which therefore passed to Irwin; and (3) whether Irwin, as a condition precedent to the relief demanded by Beggs, was not entitled to a decree vacating his purchase of the land on the first

execution. *Held* that these questions could not be as fully and fairly tried on motion, as by suit in equity; that Beggs was entitled to maintain his action, and that an injunction to restrain proceedings under the second execution, was proper and necessary.

3. JUDGMENT—*Who Concluded.* One is not concluded by a judgment in a cause to which he is not a party.

4. EXECUTION SALE—*Caveat Emptor.* Execution creditor, knowing that the debtor holds a certain interest in specified lands, assuming that the debtor has in fact the entire estate levies thereon and becomes the purchaser. In the absence of fraud or misrepresentation on the part of the debtor, he is without remedy, if in fact his purchase proves fruitless. The maxim *caveat emptor* applies.

Appeal from Phillips District Court. HON. H. P. BURKE, Judge.

Mr. J. S. BENNETT, for appellants.

MESSRS. TAYLOR & PENDELL, for appellee.

KING, J., delivered the opinion of the court.

This appeal is predicated upon two principal assignments of error, namely, (1) that the facts alleged in the complaint and supported by the evidence are not sufficient to entitle plaintiff (appellee here) to equitable relief, because it thereby appears that plaintiff had a plain, speedy and adequate remedy at law; and (2) that under the pleadings and the evidence the court, in the exercise of its equitable powers, should have granted equitable relief to the defendant, Irwin.

The suit was brought in the district court to enjoin the sale of plaintiff's property under an execution issued from the county court of Phillips county upon a judgment entered therein in a case wherein Irwin, the defendant in this case, was plaintiff, and the plaintiff herein was the defendant, and for a decree declaring said county court judgment fully paid and satisfied. Burdette, one of the defendants herein, was sheriff of Morgan county, and as such had levied upon personal property

of the plaintiff, and was about to sell the same under said execution. The complaint alleged that a large part of said judgment had been paid, and that plaintiff had made tender to the defendants of the full amount remaining unpaid, together with interest and costs, which tender had been refused. Under these conditions appellants assert, and contended in the court below upon trial, that plaintiff had an adequate remedy at law by motion in the county court from which the execution issued to have the same recalled or stayed and credit given if due, and therefore plaintiff was not entitled to equitable relief by injunction. Under ordinary circumstances that contention would be sound and should be sustained. There is no doubt that execution irregularly or improvidently issued, or issued upon a void judgment, or when the judgment has been satisfied in whole or in part, may ordinarily be reached by motion to quash made in the court where issued.—8 Enc. Pl. & Prac., 459, and authorities cited. But where complicated questions of law or of fact, such as can only be properly presented and tried upon appropriate pleadings, are involved, equitable relief by injunction is a proper remedy, and its exercise is sustained by both reason and authority.—*Snavely v. Harkrader,* 30 Grat., 487; *Crawford v. Thurmond,* 3 Leigh, 85; *Grant v. Cole,* 23 Wash., 542, 63 Pac., 263; *Smith v. Morrill,* 11 Colo. App., 284, 288, 52 Pac., 1110. The complaint alleged that upon the judgment in the county court execution was sued out by Irwin and levied upon all interests which plaintiff herein had in certain real estate, to-wit, an equity of redemption from a deed in form absolute but in fact a mortgage given to secure certain sums which plaintiff owed; that said Irwin knew of plaintiff's interests therein, and at execution sale purchased the same for the sum of $325, and in due course received therefor and recorded the sheriff's deed, and thereupon the execution was returned satisfied to the extent of $325; that

thereafter certain suits were brought against Irwin by third parties to quiet title to said real estate; that in one of such proceedings defendant defaulted, and in the other, brought by the same parties for the same purpose, dedefendant alleged as his defense that he was the owner of said real estate, and that the deed which this plaintiff asserts was a mortgage, was executed and delivered by plaintiff to defraud his creditors, of which the said Irwin was one; that upon said defense the title which said Irwin claimed under and by virtue of the sheriff's deed, was held junior and inferior to that of the parties plaintiff in the suits to quiet title; that in such proceedings this plaintiff was not a party, and was not notified; that thereafter the execution herein sought to be enjoined was issued and caused to be levied upon plaintiff's property at the instance and request of said Irwin. No effort was made by Irwin to have the partially satisfied judgment theretofore entered set aside, or the sheriff's deed made to him cancelled, by motion in the county court or otherwise. Under the allegations of the complaint it is evident that there was presented for determination the question as to whether the purchase at execution sale, alleged by the complaint to constitute payment and satisfaction of the judgment *pro tanto,* did in fact constitute payment and would therefore estop the defendant as judgment creditor from treating the sale as void or voidable and collecting the entire amount for which the judgment was originally entered. It further appears that the effect of the judgments quieting title to said real estate as against Irwin (thus making his purchase at sheriff's sale valueless to him), and whether, if such judgments were *res adjudicata* as to him, that fact would estop plaintiff in the instant case from showing that at the time of the levy upon and sale of his alleged interest in said real estate he in fact had an interest therein subject to levy and sale, and which thereby passed to the defendant, were questions pre-

sented for determination; and likewise, as now contended by appellants, whether upon such allegations they were not entitled to a decree vacating the said sale, and setting aside the alleged satisfaction of judgment as a condition precedent to allowing execution for the full amount of the original judgment. These allegations involve questions of fact and the application thereto of legal and equitable principles that could not be as readily, fully and fairly tried and settled upon a motion to quash the execution as upon a suit in equity. Upon such allegations it was entirely proper, and indeed necessary that, pending trial of the issues, execution sale should be in some manner restrained. It was said in *Smith v. Morrill, supra,* that was the only method which plaintiff could pursue to prevent the commission of the alleged wrong. Even if relief had been sought by motion in the county court, that court, in order to give adequate and speedy relief, must have exercised equitable jurisdiction over its judgment and process, and might properly refrain from so doing, leaving the parties to seek relief in a court of equity.—*Watson et al. v. Reissig,* 24 Ill., 281, 284; *Hughes v. Streeter, Ibid.,* 647, 76 Am. Dec., 777; *Scheer v. Himmelmann,* 53 Cal., 312. For the reasons given and upon the authorities cited, we think the court did not err in exercising jurisdiction as a court of equity under the particular facts and circumstances set forth in the complaint. Moreover, the substance of the litigation, rather than the form of remedy adopted, should be regarded when, as in this case, the demurrer was not raised until after the answer had been filed for several months and trial on the merits had been called.

Appellants insist that, upon the pleadings and the evidence, the decree was erroneous, and that instead of a decree for plaintiff, the judgment should have ordered the execution sale of plaintiff's real estate vacated, the deed therefor to the defendant herein set aside, and the

temporary injunction granted herein perpetuated only upon condition that appellee, in addition to the moneys paid or tendered and deposited in the registry of the court, should pay to the said Irwin the sum of $325 and interest. Upon trial, the court found that all the material allegations of the complaint were sustained by the evidence; that at the time of the levy upon and sale of plaintiff's real estate he had the interests therein alleged in the complaint, and that defendant purchased the same for $325. Plaintiff was not barred, by the judgments thereafter obtained quieting title in suits to which he was not a party, from showing that at the time of the levy and sale he was owner of the interests alleged by him. Furthermore, the defendant herein in making his defense to the said suits to quiet title, instead of relying upon the equity of redemption which plaintiff had or claimed, defended upon the ground that the deed which plaintiff claimed to be a mortgage was an absolute deed, executed and delivered in fraud of his creditors. Upon this defense judgment was against him. It is possible, and indeed probable, that if he had contested the suits upon proper allegations and proof he might have held plaintiff's interest in the property which he bid in for the sum of $325. We perceive no reason why plaintiff in the instant case is, or of right ought to be, estopped in this proceeding from showing that he had the interests claimed, and which in fact passed to the defendant by sheriff's deed. Under the circumstances of this case, the court having found that plaintiff had some interest which the defendant levied upon and sold, and it further appearing that the defendant, with knowledge of such interest, assumed that plaintiff had another and different interest, to-wit, the entire interest, and caused such interest to be levied upon and sold and at such sale purchased the same, and defended the title upon that assumption, we think he also assumed the risk and took the chances of

the title's being good; and if it in fact proved worthless, he is without a remedy, in the absence of a showing of misrepresentation or fraud upon the part of the execution debtor, plaintiff herein, which caused his mistake, if mistake it was. The doctrine of *caveat emptor* applies in this case.—*Copeland v. Bank,* 13 Colo. App., 489, 59 Pac., 70; *Rodgers v. Smith,* 2 Ind., 526; *Bassett v. Lockard,* 60 Ill., 164; *Boggs v. Hargrave,* 16 Cal., 559, 76 Am. Dec., 561; *Goodbar & Co. v. Daniel,* 88 Ala., 583, 7 So., 254, 16 Am. St., 76; *Thomas v. Glazener,* 90 Ala., 537, 78 So., 153, 24 Am. St., 830.

The judgment is affirmed.

[No. 3636.]

LEEPER V. SCHROEDER ET AL.

1. PAYMENT—*By Check.* A check upon a bank which has no funds of the drawer, and has consented to meet the check only by draft on another bank which will only give credit therefor, is no payment.

2. SALE—*Purchaser's Refusal to Accept—Seller's Remedy.* Where upon executory agreement for the sale of chattels the purchaser refuses to perform his contract, the seller may (1) store the goods for him, and recover the full contract price, or (2) retain the goods and recover the difference between the agreed price and the market price at the time and place specified in the agreement for delivery, or (3) he may sell the goods at the best price obtainable and recover of the purchaser the loss sustained, measured, in general, by the difference between the contract price and the proceeds of the sale.

And where neither title or possession has passed, the seller is not required to give notice to the purchaser of his intention to resell the goods, as a condition precedent to his right to recover what is lost thereby. *Magnes v. Sioux City Co.,* 14 Colo. App., 219, followed.

Nor is it necessary that the particular goods, the subject-matter of the contract, should, before the purchaser's refusal to accept, have been segregated and set apart.

And if the place of delivery affords no market, the vendor may send the goods to the nearest and most available market. One pur-

pose of the re-sale is to establish the true value of the goods, at the time, and not leave this to future controversy; therefore, the subject-matter of the contract being a number of lambs on foot, the place of delivery being Grant, N. M., where there was no market, and the lambs being shipped to Denver and sold there, the market price being clearly established, the fact that some of those actually delivered on re-sale were not fully up to the requirements of the contract, and that some died while in transit, and that some were shipped from another place than that specified for the delivery—the expense of the shipment not being increased—was held unimportant.

Appeal from Weld District Court. HON. JAMES E. GARRIGUES, Judge.

MR. F. J. GREEN, MR. C. D. TODD, for appellant.

MR. T. J. LEFTWICH, MR. H. I. GARBUTT, MESSRS. CLAMMER & TEMPLE, for appellees.

KING, J., delivered the opinion of the court.

F. J. Schroeder and B. A. McMurry, co-partners under the firm name of Schroeder & McMurry, appellees herein, brought their action to recover from the defendant, Leeper, the sum of $977.78, as damages for an alleged breach of contract which the said defendant had entered into for the purchase from plaintiffs of certain lambs. Upon trial to the court without the intervention of a jury judgment was rendered for plaintiffs, in the amount demanded. The contract sued upon was in writing and as follows:

"This contract and agreement made and entered into this 22nd day of August in the year of 1907, at Greeley, Colo., by and between Schroeder & McMurry as party of the first part and C. E. Leeper as party of the second part, that party of the first part has this day sold and contracted with the party of the second part the following described sheep: 1,040 head of good, open-wooled lambs of Grants, New Mex., guaranteed to average not less than 60 lbs., and not to take any under 50 lbs., to be

weighed after a twelve-hour shrink in a dry corral, at $5.65/100 per hundred pounds, F. O. B. at Grants, New Mex., on or about the 31st day of October, 1907, at which time and place the party of the second part agrees to receive them. Received on the above $50.00/000, balance of the purchase price to be paid when sheep are delivered.

SCHROEDER & MCMURRY,
C. E. LEEPER."

The complaint alleged that pursuant to the terms of this contract plaintiffs had, ready to deliver, at Grants, New Mexico, on the 31st day of October, 1907, lambs of the number and quality mentioned in the contract, and cars for their transportation, and held the same several days after said time; that prior to the date fixed for delivery they notified defendant that the stock would be ready for delivery on the date and at the place named in the contract, and that defendant had failed and refused to receive the same; that because of a serious money panic there was no market value for the lambs at Grants, New Mexico, at the time of the refusal of the defendant to receive the same, and that Denver was the nearest place at which there was a market; that after refusal of the defendant to receive the lambs, plaintiffs shipped the same to the market in Denver, where they were sold on said market for the highest price which they could obtain; that the difference between the contract price and the selling price, after deducting freight charges from Grants, New Mexico, to Denver, Colorado, and making allowance for the $50 paid in advance, was $977.78. The re-sale was made about December first.

Defendant, after demurrer which was overruled, answered, admitting the contract, but denying that at any time after the date thereof and prior to November 12th, plaintiffs notified him that the lambs were ready for delivery, and alleged that they then gave notice that the lambs would be ready for delivery at Albuquerque, New

Mexico, within a few days, insteads of Grants; that defendant immediately proceeded to Albuquerque, arriving on the night of November 14th, and that on November 15th he was notified by plaintiff, Schroeder, that plaintiffs did not have and could not deliver at Grants, the lambs mentioned in the contract, and that plaintiffs failed and refused to deliver the lambs mentioned in the contract, at any time or place. The new matter in the answer was denied by replication.

At the trial the court found in favor of the plaintiffs on every disputed question of fact, upon evidence amply sufficient to justify such findings. The evidence upon the part of plaintiffs clearly showed that, after making the contract, they purchased and had on hand some 25,000 head of sheep, several thousand of which were at or near Grants, held, as was the usual custom, upon the open range, where they could be readily called in and delivered; that at and for some days prior to the 31st of October, and also for many days thereafter, they had a sufficient number of lambs of the weight and quality described in the contract from which they could have made the delivery as contracted, and were ready and anxious to deliver the same; that on or about the 28th of October Schroeder notified the defendant that the sheep would be ready. At that time a serious money panic was prevailing and defendant was unable to secure the money in Colorado for the purchase price, and for that reason plaintiffs agreed to extend, for a few days, the time for delivery, and also attempted to make arrangements in New Mexico, and did make arrangements, by which the paper of defendant, endorsed by plaintiffs, would be accepted by the owners of the sheep from whom plaintiffs had contracted to buy the same to fill their contract with defendant, and thereupon telegraphed defendant to come to Albuquerque and make the arrangements. Defendant presented himself at Albuquerque, but declined to make

the necessary arrangements. There was no evidence of an absolute refusal to receive the sheep, but much evidence that defendant was unable or unwilling to do anything in way of payment to carry out the agreement, unless perhaps to give his check upon a bank in Colorado in which he had no funds. He did not offer payment in that way, but on the trial contended that he had arrangements with that bank to honor his check, which claim was supported by the cashier of the bank, but whose testimony clearly showed that if the check had been presented the bank would not have paid it except by its draft upon some other bank, which also would refuse payment except by giving credit; and it is too obvious to require discussion that under the circumstances such check, if tendered, would not have been payment unless accepted, and would not have been accepted by either the plaintiffs or the owners of the sheep. It seems clear, as found by the trial court, that defendant was either unwilling to receive the sheep, or unable to make payment therefor, or both, the evidence tending to show that he was not even supplied with sufficient funds to pay freight charges. The testimony is conflicting as to the matter of notice that the sheep were ready for delivery, and as to what was said and done at Albuquerque, but the conflict is immaterial in view of the court's finding supported by testimony.

Briefly stated, appellant's main contention is (1) that under the pleadings and the evidence, notice to the defendant of plaintiff's intention to sell the lambs and hold defendant liable for the loss sustained by his breach of contract was necessary to fix his liability, and, therefore, for want of such allegation the complaint was insufficient, and for lack of such proof the evidence was likewise fatally insufficient; (2) that it was necessary to show a segregation of the lambs contracted, and tender, or readiness to tender the same so segregated and iden-

tified at the time and place mentioned in the contract, and that the same lambs so segregated and identified were the ones resold by plaintiffs; (3) that the evidence does not show a sale of the sheep for the best price that could be obtained.

1. The contract sued on is an executory contract of sale and purchase.—*Kellogg v. Frohlich,* 139 Mich., 612, 102 N. W., 1057; *Fox v. Kitton,* 19 Ill., 519, 532; *Watkins v. Nugen,* 118 Ga., 372, 45 S. E., 262; *Hatch v. Standard Oil Co.,* 100 U. S., 124, 130, 132, 25 L. Ed., 554. Upon breach by the vendee of his executory contract to purchase chattels and receive and pay for the same upon delivery, the vendor, in case title has not passed and he is in possession of the goods, may store the same for the vendee, give him notice thereof, and thereupon sue and recover the full contract price; or, he may keep the goods and recover the difference between the contract price and the market price thereof at the time and place of delivery mentioned in the contract; or, he may sell the goods for the best price he can obtain and recover from the vendee the loss sustained, generally measured by the difference between the contract price and the net proceeds derived from the sale.—Mechem on Sales, Sec. 1647; *Magnes v. Sioux City N. & S. Co.,* 14 Colo. App., 219, 59 Pac., 879. With the foregoing statement of the vendor's choice of remedies or method of proceeding to fix and measure the liability of the vendee for breach of his contract, appellant agrees, except that he insists that notice of intention to sell is a necessary element to be alleged and proven in order to fix and measure liability under the third remedy or method, which he asserts plaintiffs have elected to the exclusion of the others. As to whether notice of re-sale is necessary where title has passed there seems to be a hopeless and irreconcilable conflict of authority.—35 Cyc., 522; *Magnes v. Sioux City N. & S. Co., supra;* Mechem on Sales, Sec. 1633. In Williston on

Sales, Sec. 548, it is said that by the weight of authority there is no such absolute requirement, and the statement is supported by a long array of decisions. In Mechem on Sales, Sec. 1634, it is said: "The rule, however, which, it is believed, is sustained by the weight of authority is, that unless the goods are perishable, or other special circumstances would render notice impracticable or unavailing, notice of the seller's intention to resell must be given, if the seller intends to make the price realized upon the re-sale the basis of his recovery against the buyer." And this statement is supported by decisions from various states. But upon the necessity of notice, in case of breach of an executory contract, where neither title nor possession has passed from the vendor, we think the same conflict of authority does not exist, and that the better authority and reason, as well as the weight of authority, is that such notice is not necessary.—*Magnes v. Sioux City N. & S. Co., supra; Wallace v. Coons,* 48 Ind. App., 511, 95 N. E., 132; *Kellogg v. Frohlich, supra; Dill v. Mumford,* 19 Ind. App., 609, 49 N. E., 861. But whatever may be the weight of authority, we agree with both the reasoning and the conclusion of Judge Bissell in *Magnes v. Sioux City N. & S. Co., supra,* in which it was held that, under the circumstances in that case, there was no necessity to give notice of intention to resell the property; and as applied to the circumstances in the instant case, we think the question may thereby be regarded as *stare decisis* in this jurisdiction.

2. Counsel for appellant contend for the rule that, as a condition precedent to the right of recovery, plaintiffs, prior to the alleged breach of contract, must have selected, segregated and set apart for defendant's use, the animals contracted for in number and quality as in the contract specified, so that they became fully identified, and in support thereof say: "The reason of the rule is that since segregation is necessarily precedent to

passing of title, the vendor must, before breach, segregate the property so that title shall pass to the vendee. He can then treat the property as the property of the vendee and act as his agent in selling the same." Counsel's conclusion is based upon the unwarranted assumption that re-sale cannot be made unless the title has passed to the vendee. In re-sales by vendor, where title and possession have not been transferred, the imputation of his agency for vendee, is a bald fiction. As has been shown, the contract was executory. The title had not passed and was not intended to pass until delivery and payment. Plaintiffs were not required to treat and could not logically treat the property as that of the defendant and sell it as his agent, for the property was not the defendant's, and never became his. The purpose of the re-sale by the vendor, in addition to saving unnecessary loss to himself, or the vendee, was thereby to obtain evidence of and establish the market price or value of the property at the time of the controversy, rather than to rely upon what must otherwise have been a matter of conjecture or opinion.—Mechem on Sales, Secs. 1649, 1692. We think the rule asserted is not applicable.

3. The evidence showed that on account of the money panic there was no market value at Grants, New Mexico, at the time and place specified for delivery, nor subsequent thereto and until the re-sale was made; that the nearest place where there was a market was Denver. It is well settled that if the place of delivery affords no market for the articles sold, the vendor may send the goods to the nearest and most available market and there dispose of them in such a way as to produce the largest possible results.—Mechem on Sales, Secs. 1639, 1742; *Lewis v. Greider,* 51 N. Y., 231; *Ingram v. Wackernagel,* 83 Ia., 82, 48 N. W., 998; *Anderson v. Frank,* 45 Mo. App., 482. There was some evidence tending to show that some of the sheep actually delivered on re-sale were not fully

up to the grade required by the contract, and that some died en route. But the evidence quite clearly shows the market price in Denver at the time of the sale for sheep of the character specified in the contract; and the amount of the loss or damage was ascertained by computation at such market price upon the number contracted at the average weight specified in the contract. Under the circumstances we think this furnished a fair basis for arriving at the loss sustained.

We do not deem it necessary to discuss in detail other points raised by appellant, although all have been carefully considered, and the opinion would be unduly prolonged by so doing. Upon the whole record, and without regard to merely technical questions, we think the equities are with the plaintiffs. Under the trying circumstances created by the panic they did more than in law they were required to do in order to fix liability upon the defendant. They extended to him time for performance, and gave much time and effort to making arrangements by which he could raise funds to carry out his contract, even to the extent of offering the credit of their own endorsement upon his paper, and also offered a reduction of twenty-five cents per one hundred pounds from the contract price as a further inducement. The further effort to dispose of the sheep by re-sale, so as to make the loss as light as possible, was more than they were required to do under the strict rules of law. They might well have brought suit for the difference between the contract price and the market price, without any effort to dispose of the stock. And if it be conceded, as contended by the defendant, that some of the sheep resold were not shipped from Grants, and were not the identical sheep that were to have been delivered to the defendant, nevertheless, for the purpose of fixing the market price by which the loss is to be determined, it is wholly immaterial whether the sheep were the identical animals (or

shipped from the same place if the expense of the shipment was not increased) so long as they were of a corresponding grade and in such number that the market price thereof would be and was the same as if the identical sheep, segregated, set apart and identified, had been shipped from the same place and resold and delivered. The judgment is affirmed.

MORGAN, J., dissenting:

Plaintiffs recovered $2,054 damages against defendants in these two cases, Nos. 3636, 3637, (which were consolidated for trial, judgment for one-half the aforesaid amount in each case) on a breach of contract for the sale of $7,048 worth of sheep, and the judgments are so manifestly unreasonable and disproportionate that I cannot concur in the conclusion reached by my associates affirming them, because it is not, in my opinion, in harmony with exact justice, and not a correct application of the law in respect to the damages allowed.

While the record leads me to a different conclusion from that reached by the trial court, as to whether the defendants defaulted in their contract to buy the sheep, no dissent is made as to this conclusion, as there was testimony upon which such finding could be based.

The evidence on the question of damages, however, was wholly insufficient upon which to base a judgment for any amount, and especially the amount allowed, which is, to my mind, oppressive, and vastly in excess of what justice would require, and borders upon the imposition of a penalty upon the defendants for failure to take the sheep, as the only reason they did not take them was on account of the bankers' panic, because of which their checks were not acceptable in payment for the sheep, and the cash could not be obtained. Plaintiffs, themselves, could not get the cash to pay the owners from whom they had originally purchased the sheep, without first getting

it from the defendants. If plaintiffs had paid the owners in full for the sheep, and then accepted defendants' checks and taken credit in defendants' bank, until the panic was over, they would have been paid in cash, and no difficulty would have arisen. So it seems the plaintiffs were about as "deep in the mud" as the defendants were "in the mire," so far as cash was concerned.

Nevertheless, the plaintiffs sued the defendants, and alleged that they "had purchased the *said lambs* solely for the purpose of delivering the *same* to defendant in accordance with said contract; * * * That after the absolute refusal of the defendant to accept the *said lambs,* the plaintiffs, in order to prevent a total loss of the *said lambs,* shipped the *same* to the market at Denver, Colorado, and placed the *same* on the market for sale; * * * that the plaintiffs sold *said lambs* in the said open market at Denver for the highest price which the plaintiffs could obtain; * * * That the difference between the said contract price of the *said lambs* and the amount realized from the sale of *same* as aforesaid is $977.78. That owing to the aforesaid demoralized condition of the stock market it was impossible for the plaintiffs to receive any greater amount from the sale of *said lambs* than was received."

Thus the plaintiffs plant themselves squarely upon the right to sell the property and sue for the difference between the best price that could be obtained on the market, or the nearest market, and the contract price. But when the testimony is read, it is found that one of the plaintiffs testified that they did not sell "the said lambs" and did not ship "the same," but only sold 1,366 thereof, and put into the shipment 714 at a different station and from another herd, and then sold the 2,080 thus gathered together, claiming. however, that the 714 were just as good as those they had purchased and had arranged to deliver to the defendants. One of the plaintiffs testified,

even, in answer to a question as to whether he sold the same sheep he had ready for delivery to the defendants, that "the 1,366 were the same sheep—that is, part of them—they were the same sheep. Q. But the remaining 700 were not? A. We loaded them at a different point; they were not the same sheep that were loaded at Carthage." This testimony clearly indicates that even a part of the 1,366 was not taken from the sheep they had ready to deliver to the defendants, and that, certainly, all of the 714 were not taken therefrom. The query arises: What did they do with *all* of the 2,080 sheep that they had ready to deliver to the defendants, and if they were sold, how much did they get for them? They testified to a shipment and sale of a portion of them, but there is no testimony as to a sale of the others. As they relied upon recovering the difference between the contract price and what they sold the sheep for, it is quite important to know what they did with the sheep which they did not ship and sell, and, if they sold them, did they sell for more or less than defendants were to pay? The measure of damages here is, according to the pleadings, the evidence and the judgment, the difference between the contract price and the amount received on a re-sale; or, the loss sustained, on such re-sale, by the plaintiffs, if they sustained any loss. Because, if they sustained *no loss, no action* lies.

The majority opinion, with the possible exception of the notice required under the third remedy provided, correctly states the law, that:

"Upon breach by the vendee of his executory contract to purchase chattels and receive and pay for the same upon delivery, the vendor, in case title has not passed and he is in possession of the goods, may store the same for the vendee, give him notice thereof, and thereupon sue and recover the full contract price; or, he may keep the goods and recover the difference between

the contract price and the market price thereof at the time and place of delivery mentioned in the contract; or, he may sell the goods for the best price he can obtain and recover from the vendee the loss sustained, generally measured by the difference between the contract price and the net proceeds derived from the sale."

Plaintiffs adopted and relied upon the third remedy above suggested, and claim to have resold the sheep; but the majority opinion says, conceding that the sheep sold were not the same that were to be delivered to defendants, that:

"The purpose of the re-sale by the vendor, in addition to saving unnecessary loss to himself, or the vendee, was thereby to obtain evidence of and establish the market price or value of the property at the time of the controversy, rather than to rely upon what must otherwise have been a matter of conjecture or opinion."

The majority opinion thus permits the plaintiffs to recover upon the second remedy suggested, and not upon the third, upon which they relied, and upon which the judgment is based.

The majority opinion states, further, that:

"There was some evidence tending to show that some of the sheep actually delivered on re-sale were not fully up to the grade required by the contract, and that some died en route. But the evidence quite clearly shows the market price in Denver at the time of the sale for sheep of the character specified in the contract; and the amount of the loss or damage was ascertained by computation at such market price upon the number contracted at the average weight specified in the contract. Under the circumstances we think this furnished a fair basis for arriving at the loss sustained."

Thus the majority opinion permits the plaintiffs not only to recover upon a different remedy from that which they selected and upon which they tried the case, and

upon which the judgment was entered, but permits them to recover upon a grade of sheep that were not fully up to the grade required by the contract, simply because the market price, in Denver, at the time and place of the sale, for sheep, of the character specified in the contract, was shown. The evidence, however, discloses that the sheep were sold in Denver, over 500 miles from the place of delivery, and a month after the time of delivery. Further on, the majority opinion states that, "It is wholly immaterial whether the sheep were the identical animals, so long as they were of a corresponding grade." But the opinion says there was some evidence tending to show that some of the sheep were not of a corresponding grade; and the record discloses there was undisputed evidence to this effect. Mr. Farr, the man who purchased the sheep, testified that he sold part of them to a Mr. Wilson; that all of the sheep he sold to Wilson were taken from those he purchased from plaintiffs; and Mr. Wilson testified that the sheep he bought from Mr. Farr were a "mixed bunch, a few long-wooled, coarse-wooled sheep. They were not all good, open-wooled lambs. At the stockyards there were forty-three counted out as sheep and yearlings. There were about a dozen that were not open-wooled lambs." There was no testimony in rebuttal, and hence this testimony was uncontradicted, although plaintiffs did testify that the sheep that were shipped were up to the contract, but neither of them was present when *all* of them were shipped, nor when any of them were delivered in Denver. Thus the plaintiffs are permitted to recover upon a remedy which they never relied upon in their complaint, nor in their testimony, nor in the theory upon which the case was tried, and upon which a judgment was rendered, and also upon a sale of sheep that were not only different from those sold to the defendants, but not of as good a grade. Defendants are thus deprived of a substantial right, especially, because

they have never had any opportunity to rebut the testimony as to the market value upon which the plaintiffs were allowed to recover; and, generally, because no proof of a market value, at the time and place of delivery, was made, and no definite proof thereof, at any other time or place. The defendants went to trial, and the case was tried, upon the claim by the plaintiffs that they resold the sheep for the best price they could obtain, and the defendants were never apprised, before or during the trial, that any claim would be made as to the market price, or any attempt to recover upon that remedy, and their first knowledge that the plaintiffs did recover upon that remedy will be when they read, or have notice of, the opinion of this court.

The majority opinion seems to have adopted the view taken by the lower court when it was said in the findings that "they (plaintiffs) simply sold out the herd of sheep remaining, up here." "I believe for the best price they could obtain." And the plaintiffs are permitted to recover upon the sale of what they had left, out of about 15,000 head of sheep, and after upwards of 13,000 head had been culled therefrom. (One of the plaintiffs testified that, "there might have been a few under fifty pounds, but it was their privilege to weigh them and throw them out.") There is no testimony, even, to show or upon which to base any definite conclusion, but what the plaintiffs sold all of the sheep which they had ready to deliver to the defendants, and shipped and sold upon the market a remnant of 1,366, at Grants, New Mexico, after disposing of all the rest of about 15,000 head which they claim to have had at the time and place of delivery, from which they intended to select the 2,080 for the defendants.

Suppose, however, we say this court is justified in concluding that plaintiffs' complaint might fit an action adopting the second remedy suggested, and in affirming

this judgment—giving the plaintiffs $2,054 damages on a contract of sale of 2,080 lambs—nevertheless, the evidence will disclose that the plaintiffs never brought themselves within the purview of any right to recover for the market value, for the reason, no doubt, that their entire purpose was to recover upon another theory, that is, the difference between the price they sold the sheep for and the price defendants were to pay. It would have been an easy matter for them to have established the market value at the time and place of delivery, but no testimony was introduced for such purpose, and none crept in, under the proof as to what they sold the sheep for, from which any definite conclusion can be reached. A mere statement that there was no market at Grants, New Mexico, the place of delivery, made as a reason for selling at Denver, and what the market price was in Denver, 500 miles away, and a month after the time of delivery, and the sale of one bunch of sheep different in some instances as to grade, and the testimony of one witness as to what the market price in Denver was, without giving the date, established nothing as to the market value at the time and place of delivery, or anything near to it.

Furthermore—and particular attention is called to this testimony—one of the plaintiffs testified that when the 1,366 were loaded at Grants, New Mexico, the owners agreed to release the plaintiffs from their contracts of purchase as to all sheep that had strayed too far away to be gathered together, for shipment, if plaintiffs would take the 1,366, which one of the plaintiffs testified was all they had left at Grants. If 2,080 strayed away, then all that defendants were to receive are still there; at least, 714 must be. What was plaintiffs' loss on these, if any? This loss, under the allegations of the complaint and the evidence, and in all fairness, is the true measure and basis of damages. And, again, plaintiffs testified that there were others who defaulted in their contracts to buy; is

it not right to assume, in the absence of any testimony thereupon, that at least a portion of the remnant, even of the 1,366, were sheep that others failed to take, especially when one of the plaintiffs testified "*part* of them were the same sheep" the defendants failed to take? All of these things show the absolute insufficiency of the evidence.

Plaintiffs demand the last cent which the law, on account of its universality, gives to them, and the same strict rule should be applied when it comes to their claim and proof of damages. Plaintiffs' own testimony discloses that they not only failed to prove themselves within the rule or remedy suggested in the majority opinion as to a re-sale of the sheep, but they also failed to establish any market value at the time and place of delivery so as to entitle them to recover upon the second remedy suggested by the majority opinion—that is, upon the difference between the selling price and the market value of the sheep, and they certainly established, by their own testimony, that they sustained a loss only as to 1,366 head.

Defendants contend that they should have had notice from the plaintiffs of their intention to resell the sheep. It would have been no trouble for the plaintiffs to have given this notice, and it would have been evidence of an intention to deal fairly with the defendants. It would have given defendants an opportunity to have protected themselves. It seems to have been no trouble to notify them to get their cash to pay for the sheep. The authorities are somewhat in conflict as to the necessity of notice, but the better rule is that each case must be decided upon its own facts and circumstances.—*Magnes v. Sioux City N. & S. Co.*, 14 Colo. App., 219, 59 Pac., 879.

In this case the court held that notice of the *time* and *place*, under the law, was not necessary, but, as to notice of *intention* to *resell*, it is held that:

"We are not compelled to go to the verge of holding that there is no necessity to inform the vendee of the intention to resell, nor of holding that the vendor may dispense with this notice under any and all circumstances. All we intend to hold is that under the circumstances disclosed by this record, the vendor was under no obligation to give the vendee this notice."

In *J. D. Best Co. v. Brewer,* 50 Colo., 455, 115 Pac., 726, Campbell, J., said:

"Counsel for defendant cites a number of authorities on the appropriate measure of damages where a vendor sues a vendee who refuses to carry out a contract of sale. They may correctly apply the rule under their respective facts. The court properly instructed the jury here that there were several remedies open to plaintiff, and that, where a defendant wrongfully refused to accept a consignment of goods which he has purchased, and where the title has not entirely passed from the seller, or where the buyer wrongfully refuses to receive the goods and gives his consent thereto, the seller may, as he did here, take possession of the goods, and, *after due notice to the buyer,* sell them for the best obtainable price, and recover the difference, if any, between the amount so received and the contract price. This was proper under the evidence in this case, and the rights of defendant were sufficiently guarded and it certainly cannot complain of this instruction.—35 Cyc., 520; *Magnes v. Sioux City N. & S. Co.,* 14 Colo. App., 219." [The italics are mine.]

The reason no notice was given discloses to my mind, as the evidence throughout the trial discloses, that when plaintiffs sold this remnant of sheep, they did not have in mind any suit against defendants, but were simply disposing of what they had left out of the purchase and sale of a great number of sheep, over 100,000, mostly from New Mexico, selling six carloads to Farr and keeping the balance of the 10,000 of those shipped to Denver,

for their own use, thus clearing up the purchase, sale and delivery of sheep in New Mexico for that year.

The majority opinion says: "We agree with both the reasoning and the conclusion of Judge Bissell, in *Magnes v. Sioux City N. & S. Co., supra.*" There is a conclusion in that case to which especial attention is directed, concerning the measure of damages, which is quite applicable to the present case, as follows:

"Whether there was or was not a market price, whether there was a possibility to make a sale at another or greater price, whether the trees could have been preserved and a market made or a seller procured, all these things were left entirely unexplained by the company, nor was there otherwise any proof on which to base a judgment for the difference between the price at which the property was sold and that which Magnes had agreed to pay for it. This difference was assumed to be the measure of damages and the measure of recovery. While, as we have already said, this might under some circumstances control, under the proof it was wholly illegitimate and there is in the record no evidence showing that the company sustained damages to the extent of $175, which was their recovery.

"Since this is true, we are compelled to set aside the judgment and remand the cause for further consideration."

The result of the majority opinion is that, conceding plaintiffs could not recover upon the right or remedy stated in their complaint, and upon which the case was tried, and judgment rendered, they may, nevertheless, recover upon the second remedy suggested—that is, upon the theory that they kept the sheep and sued for the difference between the contract price and the fair market value at the time and place of delivery. This, in view of the circumstances, the indefiniteness and insufficiency of the testimony, and the law applicable to the case, consid-

ering at all times the excessive damages obtained and the substantial rights of defendants denied, ought not to be the decision of this court, and with deference to the view of my associates, it is my opinion the causes should be reversed and remanded.

[No. 3637.]

ANDERSON v. SCHROEDER ET AL.

The case ruled by the judgment in *Leeper v. Schroeder, ante.*

Appeal from Weld District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. F. J. GREEN, Mr. C. D. TODD, for appellant.

Mr. T. J. LEFTWICH, Mr. H. I. GARBUTT, MESSRS. CLAMMER & TEMPLE, for appellees.

KING, J., delivered the opinion of the court.

The plaintiffs in this case are the same as in *Leeper v. Schroeder & McMurry,* decided by this court at the present term, and, with the exception of the name of the appellant, the parties, pleadings, evidence, findings and judgment of the trial court, and assignments of errors, are, in every material respect, the same as in said cause, and for the reasons set forth in the opinion therein handed down, the judgment herein appealed from is affirmed.

MORGAN, J., dissents.

[No. 3640.]

RILEY V. LEMIEUX.

1. JUDGMENT—*Against One Not in Being* at the institution of the action, is void.

2. EVIDENCE—*Admission in Pleading*, that a certain action was instituted, and decree given therein, but alleging that the defendant named in the action was dead before its institution, is not an admission of the jurisdiction of the court in which the decree was given.

3. WORDS AND PHRASES—"*Unmarried.*" A stipulation made during the trial of a bill to quiet the title to land, that a person named, the former proprietor of the lands, "died unmarried," imports that he never married, and left no descendants.

4. TAX TITLE—*Void Deed.* A treasurer's deed which fails to describe the lands sold, is void.

Appeal from Kit Carson District Court. HON. W. S. MORRIS, Judge.

Mr. GEORGE W. TAYLOR, for appellant.

Mr. P. B. GODSMAN, for appellee.

HURLBUT, J., delivered the opinion of the court.

Code action to quiet title, by appellee (plaintiff below) against appellant, in the district court of Kit Carson county. Neither the transcript nor the abstract of record shows when the complaint was filed, but it appears that it was sworn to March 14, 1908. Therefore, it may be presumed that the action was instituted on that date or at some time subsequent thereto.

Plaintiff secured a decree for the disputed premises, from which this appeal is prosecuted.

The action involved the title to the N. W. ¼ of Sec. 35, Twp. 8 S., R. 44 W. The answer denies the allegations of the complaint material to plaintiff's recovery, sets up title in defendant by virtue of a tax deed upon which his title depends, and pleads the two statutes of limitation as found in sec. 6 and sec. 7 respectively, Ses-

sion Laws 1893, pages 328 and 329. The answer further pleads what is termed a fourth defense and cross-bill, founded upon a decree of the county court of said Kit Carson county, also a fifth defense and cross-bill, equivalent to a cause of action under the code to quiet title, based on the tax deed.

At the trial it was stipulated that the land in issue was, and had been for ten years prior to the commencement of the action, vacant and unoccupied; "that E. T. Lemieux, who was the owner of the land in controversy in this action at the time when the same was sold for taxes, died intestate and unmarried at San Francisco, in the State of California, in the month of July, A. D. 1899; that Joseph Lemieux, the plaintiff in this action, is the father of the said E. T. Lemieux; that E. T. Lemieux and Eugene T. Lemieux were one and the same person."

Plaintiff by proper proof fixed title to the premises in E. T. Lemieux, by patent from the government.

Defendant offered in evidence the complaint in the action in said county court, upon which the decree is founded. This was excluded by the court upon plaintiff's objection. It shows it was filed April 23rd, 1904. The decree of the county court was then offered in evidence by defendant, but excluded upon plaintiffs objection that the same was rendered after defendant's death, and that the county court action was begun subsequent to the death of defendant therein named. The ruling was right. It is apparent from the record that when the suit was instituted in the county court against E. T. Lemieux he had been dead nearly five years. While there are a few cases to the contrary, the general current of authority adopts the rule that a judgment rendered in an action begun after the death of defendant therein is null and void, and can be attacked directly or collaterally.

"If an action is begun against one who is dead at the time, and prosecuted to judgment, the judgment will

be absolutely void for want of jurisdiction."—23 Cyc., 681.

"That there should, at some time during its progress, be living parties to both sides of an action, we think indispensable; and that no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as defendant, or in his name as plaintiff; and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun, and that a judgment for or against him must necessarily be void."—1 Freeman on Judgments, Sec. 120, 153; Black on Judgments, 2nd Ed., Sec. 203; *Jones Lumber Co. v. Rhoades,* 17 Tex. Civ. App., 665, 41 S. W., 102; *Claflin et al. v. Dunne,* 129 Ill., 241, 21 N. E., 834, 16 Am. St., 263; *Crosley v. Hutton,* 98 Mo., 197, 11 S. W., 613; *Mortgage Trust Co. v. Redd,* 38 Colo., 458, 88 Pac., 473, 8 L. R. A. (N. S.), 1215, 120 Am. St., 132; *Wilson v. Hawthorne,* 14 Colo., 530, 24 Pac., 548; *Smith v. Morrill,* 12 Colo. App., 233, 55 Pac., 824.

In appellant's brief counsel contends that the pleadings and evidence admit the sufficiency of service and validity of decree in the county court case. The record fails to disclose such to be the case. The fourth defense and cross-complaint of the answer pleads the county court decree as a complete defense to plaintiff's cause of action. In his reply plaintiff admits that the suit was brought in the county court and decree rendered as stated in the answer, but at the same time denies the decree to be of any effect against plaintiff, for the reason that the action upon which it is based was begun subsequent to the death of defendant therein named. This admission, accompanied by the statement that the decree was of no effect as against plaintiff, cannot be said to be an admission of the jurisdiction of the county court or the validity of the decree. It is a qualified admission only, and must

be taken with the limitations placed thereon by defendant.—*Cotzhausen v. Keehler and Another,* 42 Wis., 332; 31 Cyc., 212 and 213.

Another claim urged by appellant is that there is no evidence showing Joseph Lemieux, plaintiff, to have been the owner of the premises in dispute at the time this suit was brought; his contention being that, while the stipulation admits that E. T. Lemieux was the owner of the land in issue at the time it was sold for taxes, and that plaintiff is his father, it does not follow that plaintiff was the owner of the same or any part thereof, reasoning that for all that appears of record, E. T. Lemieux may have been a widower, and left children or issue thereof living at the time of his death. There is no merit in this contention. The stipulation states that E. T. Lemieux died unmarried, etc. This word "unmarried" has been repeatedly construed by courts of last resort, when used in the sense here found, and the general trend of authorities construes it as meaning "never having been married." This is held to be its ordinary and primary meaning.—Vol. 8, Words and Phrases, p. 7196; *Hall v. Robertson,* 21 Eng. Law & Eq., 504; *Frail v. Carstairs,* 187 Ill., 310, 58 N. E., 401. A fair interpretation of the stipulation on this point would justify a presumption that the parties meant that at the time of E. T. Lemieux's death he left no children or issue thereof surviving him. The stipulation was made during the progress of the trial, and, if we consider the occasion and purpose of the same, any other interpretation would be against the apparent intention of the parties, and permit of its being used as a trap, to plaintiff's disadvantage.

The fourth assignment of error challenges the ruling of the court in excluding from evidence the tax deed upon which the fifth defense and cross-bill is predicated. This deed is almost identical with one considered by the

supreme court in *Lines v. Digges*, 43 Colo., 166, 95 Pac., 341, wherein that tribunal held the deed to be void, for the reason that it did not describe, in terms, the property bid for and sold, or by apt words indicate such property. The same imperfection exists in the deed we are now considering, which renders it void on its face; hence no error was committed in excluding it.

Defendant wholly failed to establish by requisite proof either the second or third defense, both being based upon the statute of limitations.

We discover no error in the proceedings before the trial court. The judgment is affirmed.

[No. 3643.]

THE GREAT WESTERN RAILWAY CO. v. DRORBAUGH.

1. DAMAGES—*Punitive*. Where the master exercises reasonable care in selecting and employing the servant he is not charged with punitive damages for the torts or neglects of the servant, not authorized or afterwards ratified by him.

2. NEGLIGENCE—*Ordinary Care*, depends on the circumstances of the particular case.

3. —— *Traveler at Railway Crossing*. A traveler whose vehicle breaks down, or is stalled, upon a railway crossing is bound only to ordinary diligence to avoid injury from passing trains; and it seems that the railway company is bound only to the same degree of diligence to avoid doing him injury.

Plaintiff's wagon, heavily loaded, broke down upon a crossing of defendant's railway. While plaintiff was transferring the load to another wagon defendant's train, having taken water at a stand-pipe 1,000 feet from the crossing, proceeded at speed, without giving any signal, or keeping any outlook, crashing into and destroying the wagons as they stood upon the crossing. Defendant's servants in charge of the train knew that the crossing was constantly thronged with passing teams. It was near mid-day, and the crossing was in plain view of the fireman upon the engine, almost from the moment of leaving the stand-pipe. *Held* defendant was chargeable with negligence.

That the jury might have found that plaintiff was entitled to assume that the servants of defendant would see and take notice of his perilous position, and stopped the train in time to avoid doing him injury; and that he was not to be declared guilty of contributory negligence, as matter of law, in failing to signal the train.

4. CONTRIBUTORY NEGLIGENCE—*Measure of Proof Required to Establish*, is the same as required to establish negligence of the defendant.

5. APPEALS—*Harmless Error.* Action for negligence. The court charged that if after becoming aware of the dangerous position of plaintiff, defendant's engineer did not "exercise all diligence" to avoid an accident, they should find for the plaintiff. The jury might have found upon the evidence, either that the engineer exercised no care at all, or that he did everything possible to avoid the accident. Under the evidence there was no middle ground. The error in the instruction was declared harmless.

6. —— *Judgment.* The judgment below being erroneous in part, the cause was remanded with directions to the court below to modify its judgment, eliminating the erroneous allowance.

Appeal from Larimer District Court. HON. HARRY P. GAMBLE, Judge.

Mr. CHARLES W. WATERMAN, Mr. CALDWELL MARTIN, and Mr. WILLIAM A. JACKSON, for appellant.

Mr. JOHN H. SIMPSON and Messrs. WARD & MONTGOMERY, for appellee.

CUNNINGHAM, Presiding Judge.

Drorbaugh filed his complaint in the district court of Larimer county on February 11, 1908, to recover actual and punitive damages from the appellant on account of the destruction of two wagons belonging to the plaintiff. One of the wagons of the appellee (hereinafter called the plaintiff) broke down upon the railroad tracks of the defendant corporation at a public crossing. This wagon was loaded with beet pulp. Plaintiff procured another wagon which he placed alongside of the broken one, both wagons being upon the track of the defendant. The pur-

pose of the plaintiff in placing the second wagon upon the track was to transfer the load from the broken wagon to the sound one, with the view of removing, as soon as possible, both wagons from the track of the defendant. While engaged in the work of transferring the pulp from one wagon to the other a train of appellant, consisting of an engine and caboose, was driven down the railroad track by defendant's servants, and collided with the wagons upon the crossing, resulting in the destruction of the two vehicles. The accident occurred between two and three o'clock in the afternoon. The plaintiff testified that he saw the engine of the defendant when it was something like one thousand feet from the crossing where he was engaged in transferring the pulp from one wagon to the other, and could have seen it at all times while it was traversing that distance; that he could have gone or sent someone up the track for the purpose of signaling the train, but he did not do so; neither did he make any attempt whatever to signal the train, but he testified that:

"As far as I was personally concerned, I took no step whatever to notify the railroad company or its agents or servants of the condition in which I was. I took it for granted that they would see in the first place, and that having seen, that they would attempt to stop in time, and that the attempt would prove successful and that I would avoid injury."

The railroad track for some distance immediately north of the railroad crossing (the train was coming, on the day in question, from the north) runs upon a curve, the outside of the curve being to the right. This fact interfered with the vision of the engineer. The fireman, for some reason, appears not to have seen the plaintiff. At any rate, if he did see him, which he might have done in ample time to prevent the collision if he had been

on the look-out, he did not report the presence of the wagons upon the track to the engineer. Evidence was introduced on behalf of the plaintiff tending to show that the fireman, from the time the train left the water tank where it had stopped for water, nearly one thousand feet from the crossing, and over all that distance, could have seen the plaintiff from the position which the fireman occupied; that for a short distance after the train left the stand-pipe, the fireman had his head out of the window and was looking in plaintiff's direction, but that he thereafter withdrew his head, and did not look out of the cab again until the wagon was actually struck. The engineer testified that he was unaware of the wagons upon the track until he was about one hundred forty feet from the crossing, and that thereafter he did everything in his power to stop the train. There were no signals given by the engineer other than his signal to the conductor at the time of the starting of the train from the water tank; that the whistle was not blown or the bell rung at all after the train left the stand-pipe until it had struck plaintiff's wagon. At least there was evidence introduced by the plaintiff to this effect. Plaintiff's evidence also tends to show that the train did not slacken speed at all until the wagons were actually struck. There was evidence that the crossing, which was in or near the town of Loveland, was at that time of the year in almost constant use; that at least six hundred teams passed there during a day of ten hours, and that it was being used a great deal at that particular time of the day. Defendant's engineer, called as a witness in its behalf, testified that he had had experience for five years upon this particular road, and knew that teams were passing there almost constantly; that he knew loaded teams were liable to get stalled there. He also testified that he knew that for a quarter of a mile beet pulp was strewn along

and upon the track on each side of the crossing, having the effect of making it more difficult to stop the train because of the slippery character of the crushed pulp upon the tracks. He further testified that it took him a distance of one hundred feet to come to a full stop, and that he could not see the crossing in question for one hundred and forty feet before he reached it, yet under all these circumstances he gave no direction to the fireman to keep a watch out upon his (the fireman's) side and this notwithstanding the fireman was shown to have been inexperienced, or had been firing only for about six weeks. One witness testified in behalf of plaintiff that, observing the approach of the train, and seeing that it was making no effort to stop, he (the witness) ran down the track a considerable distance, waving his hat to attract the attention of the fireman and engineer. The evidence of this witness tends to show that if the fireman had been on the lookout, he could not have failed to observe the signals which this witness was giving. Indeed, he could have seen the wagons upon the track at all times without any signal whatever. In this resume of the testimony we have, as it is our duty to do, considered and given it from the standpoint most favorable to the plaintiff. A verdict was returned in favor of the plaintiff for $250 actual and $250 punitive damages, and judgment was accordingly entered. From this judgment the case is here on appeal.

1. The first matter which we shall consider is the contention made on behalf of the defendant that punitive damages cannot, under the circumstances of this case, be awarded against a corporation. This contention finds support in the opinion rendered in *Ristine, Receiver, v. Blocker,* 15 Colo. App., 224, 61 Pac., 486. As stated in 13 Cyc., 114:

"How far a principal is liable in exemplary damages

for the acts of his agent is a question about which there is the utmost contrariety, and not a little confusion of authority. * * * Some of the courts have laid down the broad doctrine that a principal is liable in exemplary damages for the acts of his agent, however tortious or unauthorized, where they are performed in the course of his regular business, on the ground that the principal is liable for all acts so done by his agent; and this, too, whether such acts are previously authorized or subsequently ratified by the principal. The better rule on this subject seems to be that a principal will not be held liable in exemplary damages for the act of an agent, unless it be shown that he authorized or approved the act for which the exemplary damages are claimed, that he approved of or participated in the wrong of which his agent had been guilty, or that he had not exercised proper care in selecting his servants."

As further illustrating the conflict in authorities on this vexed question, see Sutherland on Damages (2nd Ed.), Vol. 1, Sec. 408 *et seq.;* Watson on Damages from Personal Injury (1909), Sec. 734; Cook on Corporations (6th Ed.), Sec. 15b.

Counsel for plaintiff, in their brief and on oral argument, have contended with much force against the doctrine laid down in the case of *Ristine v. Blocker, supra.* But we are unwilling to disturb the rule therein announced, and thus further add to the confusion and uncertainty of the rule in this state pertaining to exemplary damages as applied to corporations, if it be true, as counsel contends, that there is such confusion. We think it more fitting that a reconsideration of the doctrine as announced in the Blocker case should be left to the supreme court of this state. Adopting the rule in the Ristine case, as we are constrained to do, we are obliged to hold that the trial court committed error in submitting

to the jury the question of exemplary damages, and that the verdict and judgment in favor of the plaintiff, insofar as it pertains to exemplary damages, cannot stand.

2. The defendant complains of Instruction No. 11, given by the trial court, which reads as follows:

"You are further instructed that if you believe and find from the evidence in this case that after becoming aware of, and having notice of the position of danger in which the plaintiff was situated, defendant's engineer did not at once exercise all diligence in an effort to avert an accident, then you will find for the plaintiff, notwithstanding the fact that negligence of plaintiff may have exposed him to the danger in the first instance."

This instruction, we think, is probably erroneous in that it places too high a degree of care upon the defendant. We think the authorities are fairly harmonious in holding that under the circumstances as detailed in this instruction the defendant is only required to exercise ordinary care. What constitutes ordinary care, of course, depends upon the facts and circumstances in each case. Numerous authorities cited by the plaintiff in his brief, though cited upon other points, support the view we have here expressed. Cases almost without number can be found supporting this view, but we shall content ourselves with citing the following from this jurisdiction: *D. & R. G. Co. v. Buffehr,* 30 Colo., 27, 69 Pac., 582; *Denver, etc., Co. v. Dwyer,* 20 Colo., 132-7, 36 Pac., 1106; *Hector M. Co. v. Robertson,* 22 Colo., 494, 45 Pac., 406; *Phillips v. Denver Tram. Co.,* 53 Colo., 458, 128 Pac., 460.

But it does not necessarily follow, and as we view it, it does not follow at all, that the error pointed out in this instruction was in any wise prejudicial to the defendant. The evidence of plaintiff tended to show that the defendant used no care or caution whatever to prevent the happening of the accident, while the testimony

of the engineer and fireman was to the effect that the former did everything that could be done to prevent it after he discovered the wagons upon the track. On this subject the engineer testified:

"As soon as I mistrusted there was something wrong, I threw the brake-valve into the emergency and gave sand to the rails; that is, sanded it as well as I could. * * * *There was nothing else that I was able to do that would have tended to check the movement of the train.* * * * I did everything I could have done to stop that train. *After we saw the team we did everything we could have done to stop it.*"

The fireman testified as follows:

"*I know of nothing that could have been done by the engineer at this time, under those circumstances, that he did not do to avoid that collision.*" [The italics are ours.]

Had there been evidence offered on behalf of either party tending to show that the engineer made ineffectual or misdirected efforts to stop the train, but that in so doing he did not employ all the resources at his command to effectuate that purpose, then we should feel disposed to hold that the error in the instruction to which we have directed attention constituted reversible error, but where the record, as in this case, shows either that the engineer did nothing whatever to stop the train, or that he did everything that was possible for him to do, that is, "exercised all diligence," we are unable to perceive wherein the defendant was prejudiced by the imposition of too high a degree of care upon its employe. The jury will be presumed to have followed the instructions of the court and been guided by the evidence in reaching their verdict. And if they did this, they must have concluded that the testimony of the plaintiff,

to the effect that no care whatever was used, stated the true situation, and they must have discredited the testimony of the defendant's fireman and engineer to the effect that everything possible was done.

3. It is vigorously contended by defendant that the testimony of plaintiff, which we have liberally incorporated in our statement of the facts, conclusively shows that the plaintiff was, as a matter of law, guilty of contributory negligence, and that for this reason the trial court should have directed a verdict in its favor. The law applicable to this contention has been elaborately considered in the recent case of *Phillips v. Denver City Tramway Co.*, 53 Colo., 458, 128 Pac., 460. In that case Chief Justice Musser has with much industry collated the authorities, and with unusual clearness laid down the rules of law governing in such matters. At page 462 of the Phillips case Judge Musser says:

"The question whether such contributory negligence has been proven is usually one for the jury. Under all the authorities it is only in the clearest of cases, when the facts are undisputed and it is plain that all intelligent men can draw but one inference from them, that the question is ever one of law for the court."

The *quantum* of proof required to establish contributory negligence is, of course, the same as is required to establish negligence. The measure of plaintiff's duty in this case was, "that of ordinary and reasonable care under all the facts and circumstances."—*Nichols v. C. B. & Q. R. R. Co.*, 44 Colo., 501, 98 Pac., 808.

"Negligence in a particular case is generally a matter for the jury to determine, and it is always so when the measure of duty is ordinary and reasonable care. * * * It is only where there is an entire absence of testimony tending to establish the case that a non-suit may properly be ordered or a verdict directed."

Williams v. Sleepy Hollow M. Co., 37 Colo., 62, 86 Pac., 337, quoted with approval in *Phillips v. Denver Co., supra.* Both in the Williams and the Phillips cases the following from *Railroad Co. v. Van Steinburg,* 17 Mich., 120, opinion by Chief Justice Cooley, is quoted with approval:

"For when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first judge has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed, in which a judge would feel at liberty to take the question of the plaintiff's negligence away from the jury."

We shall not further prolong this opinion by quoting from the Colorado authorities, but proceed to the application of the doctrine now well established in Colorado to the facts which the record in the case before us has established, or reasonably tends to establish. Summarized again, for the purpose of determining whether the plaintiff used reasonable care to prevent the accident, the facts which the evidence tends to disclose are that for almost one thousand feet the wagons of the plaintiff

were in full view of the fireman, at least, who was upon the engine; that the fireman, directly after leaving the water tank where the engine had stopped for water, looked out of the cab in the direction of the plaintiff and the wagons. The accident happened almost at midday, and there was nothing whatever to prevent the fireman from seeing the wagons every moment of the time after his train left the water tank and before it collided with them; the wagons were upon a crossing where teams were passing almost, if not quite, every minute of the day; it was a frequent occurrence for loaded wagons to break down upon the track at this particular crossing. With all these facts the engineer admits he was familiar. The train was running slowly—the engineer says in the neighborhood of eight or ten miles an hour—when he first saw the wagons. Trains had frequently stopped voluntarily under such conditions, that is, when wagons had broken down upon this particular crossing. Under these circumstances we are not willing to say, as a matter of law, that the plaintiff was guilty of contributory negligence, that is, that he did not exercise the care of an ordinarily prudent man when he assumed that the train would be stopped in time to prevent the accident. Moreover, from the plaintiff's evidence, no amount of gesticulation on his part could have attracted the attention of the engineer or the fireman, since, according to the testimony of the engineer, he, on account of the curve in the track, could not have seen the plaintiff, and the testimony is practically uncontradicted that the fireman would not have seen him because he (the fireman) was shoveling coal or otherwise engaged, and was not on the lookout. This evidence is strongly supported by the further evidence, offered on behalf of plaintiff, that a disinterested party did run down the track a considerable distance, towards the approaching train, wav-

ing his hat as a signal in a vain effort to attract the attention of the fireman and the engineer.

Our conclusion is that the evidence discloses clearly negligence on the part of the defendant, and that there is sufficient evidence in the record to support the apparent finding of the jury that the plaintiff was not guilty of contributory negligence.

The judgment, therefore, as to the amount of actual damages awarded the plaintiff should be sustained. The case is remanded with instructions to the trial court to modify the judgment to the extent of eliminating so much of it as was awarded by way of exemplary damages.

Modified and Affirmed.

Decided May 12, A. D. 1913. Rehearing denied June 10, A. D. 1913.

[No. 3648.]

CALLAHAN ET AL. V. REINHARDT.

1. TAX TITLES—*Void Deed.* A tax deed which shows upon its face that non-contiguous lands were sold to the county for a gross sum, is void.

So, the county being the purchaser, if it appears that the certificate was assigned by the county clerk more than three years after the date of the sale.

2. —— *Limitation.* The five years' statute of limitations (Rev. Stat., Sec. 5733) is no bar to an action to quiet title. A void deed does not set the statute in motion.

3. —— *Payment of Taxes.* One claiming vacant lands must, in order to avail of the seven years' limitation (Rev. Stat., Sec. 4090) show that seven full years intervened between the first payment of taxes and the institution of the action, of the paramount owner.

Appeal from Logan District Court. HON. H. P. BURKE, Judge.

Messrs. McCONLEY & HINKLEY, for appellants.

Messrs. MUNSON & MUNSON, for appellees.

MORGAN, J.

Appeal from a judgment for plaintiff in an action to quiet title to one-half of a quarter-section of land. The judgment is affirmed upon the authority of the following citations.

A tax deed is void on its face if non-contiguous tracts of land are sold *en masse* for a gross sum, even when bid in by the county; or if the county clerk assigns the certificate of purchase more than three years after the sale.—*Fleming v. Howell,* 22 Colo. App., 382, 125 Pac., 551; *Stephens-Wilmot Inv. Co. v. Howell,* 23 Colo. App., 396, 128 Pac., 476; *Empire Ranch & Cattle Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522.

The five years statute of limitation, limiting the time within which an action shall be commenced to recover land sold for taxes, is no defense in an action to quiet title, nor does it apply where it is based upon a tax deed void upon its face.—*Empire Ranch & Cattle Co. v. Mason,* 22 Colo. App., 612, 126 Pac., 1129; *Munson v. Keim,* 53 Colo., 576, 127 Pac., 1026; *Dimpfel v. Beam,* 41 Colo., 25, 91 Pac., 1107; *Page v. Gillett,* 47 Colo., 289, 107 Pac., 290; *Bloomer v. Cristler,* 22 Colo. App., 238, 123 Pac., 966; *Fleming v. Howell, supra.*

Seven full years must intervene between the first payment of taxes and the commencement of the action, to avail a defendant pleading the seven years statute of limitations in the case of vacant and unoccupied land.—*Empire Ranch & Cattle Co. v. Howell, ante* 154, 131 Pac., 798; citing *Empire Ranch & Cattle Co. v. Howell,* 22 Colo. App., 584, 126 Pac., 1096.

Affirmed.

[No. 3652.]

BURNETT v. LINDSEY.

1. APPEALS—*Abstract.* Where the appellant fails to insert in his abstract either the evidence, or the charge of the court, and the transcript shows that no exceptions were saved to the instructions, no objection taken to the testimony offered for the appellee, and no exceptions reserved to the rulings of the court upon appellant's objection to testimony, the court will not review the judgment.

2. TRIAL—*Upon a Theory Variant From the Complaint,* by consent of the parties, waives defects in the complaint.

Appeal from Pueblo District Court. HON. J. E. RIZER, Judge.

Mr. W. H. BURNETT, for appellant.

Mr. W. M. SWIFT, for appellee.

CUNNINGHAM, Presiding Judge.

Lindsey, appellee, hereafter referred to as plaintiff, filed his complaint in the district court to recover a balance alleged to be due him from the defendant, Burnett, upon a written agreement or contract which called for the boring of a well by the plaintiff for the defendant. The agreement, which is set out in full in the pleadings, was carelessly drawn, and some of its provisions are not clear. The defendant answered, denying the material allegations of the complaint, and in his cross-complaint prayed for damages against the plaintiff. After the filing of a replication by the plaintiff, and an answer to the cross-complaint, the case proceeded to trial before a jury, resulting in a judgment in favor of the plaintiff.

Appellant has failed to include in his abstract the instructions of the court, or any of them, and omits all reference to the evidence introduced on the trial. In his brief the appellant relied upon a single assignment of error, *viz.,* "that the judgment of the court in said case

is contrary to the law." We have examined the original record, and find no exceptions whatever were saved to the court's instructions, and almost no objections were interposed by appellant to the evidence offered by the plaintiff. Where objections were interposed by appellee and sustained by the court, appellant saved no exceptions to the ruling of the trial court.

Under this state of the record, it is not our duty to review the case. Moreover, such inspection as we have made of the record convinces us that the insufficiency and defects of the plaintiff's complaint, if any there were, were cured by the apparent theory adopted by both parties on the trial, and the evidence offered and received without objection on the part of the defendant.

The judgment will therefore be affirmed.

[No. 3655.]

CALLBREATH V. HAPNEY.

TAX TITLES—*Notice of Sale—Description of Land.* Ejectment for a quarter-section of land. The defendant claimed under a tax deed. The assessment roll upon which the tax sale was based described the tract in question as containing 160 acres; the notice of the tax sale, as published, described it as 36 acres; the notice posted by the treasurer as 60 acres.

The sale was had under the statute of 1891 (Laws 1891, 286, Sec. 6).

Held that there was a substantial departure from the statute, fatal to the validity of the sale.

Appeal from Costilla District Court. HON. CHARLES C. HOLBROOK, Judge.

Mr. CHARLES F. CARNINE, for appellant.

Mr. JESSE STEPHENSON, for appellee.

CUNNINGHAM, Presiding Judge.

Appellant brought his suit in the district court in ejectment. The defendant answered, claiming title to the land involved, under and by virtue of a tax or treasurer's deed. Trial was had to the court without a jury. Judgment was rendered in favor of the defendant, appellee here. There appears from the brief to be no dispute concerning the facts involved. The appellant relies for a reversal upon three propositions, all going to the validity of the tax deed. We shall notice but one of the contentions upon which appellant relies, since in our view of the case a proper disposition of this proposition effectually and completely disposes of the appeal. The land here involved, and which the treasurer of the county attempted to convey by tax or treasurer's deed to appellee, Hapney, was described on the assessment roll for the year 1898 (it was sold for taxes for the year 1898 on December 11th, 1899) as follows: "S. W. quarter of Sec. 7, Town. 38, N. R. 11, E. N. M. M., containing 160 acres."

In the tax deed to Hapney the treasurer described the land as: "The southwest ¼ of section 7, township 38, range 11 east, of the New Mexico Principal Meridian, situated in the county of Costilla, State of Colorado."

Following this description, the treasurer, in said deed, states that he exposed to public sale "the real property above described, and again, further on in the said deed, the treasurer states that the said Hapney: "Having offered to pay the sum of $7.72 for the whole amount of taxes, interest and costs, then due and remaining unpaid on said property *for the whole of the above described property* * * * the said property was stricken off to him at that price," etc.

From which it would appear that the treasurer attempted to convey the full quarter section of land, or 160 acres, to Hapney.

The abstract of assessment for the year 1898 described the land in the same manner that it was described in the assessment roll, denominating it as 160 acres. In the notice of sale (*i. e.*, the tax sale) and the delinquent tax list for the year 1898, attached to the publisher's affidavit, the land involved is described as follows: "SW. Qr. Sec. 7, Township 38, Range 11, *36 acres.*" The notice of sale and the delinquent tax list for the year 1898, which the county treasurer posted on the outer door of his office, according to the affidavit of the deputy treasurer, which was introduced in evidence, described the lands as "S. W. Qr. Sec. 7, Township 38, Range 11, *60 acres.*" [The italics are ours.] It will be seen that there are three differing descriptions of the land in question running through the record, beginning with the assessment roll and ending with the deed. Once the land is described clearly as consisting of 160 acres. Inferentially it is so described in the deed. The published notice of sale describes it as thirty-six acres, according to the affidavit of the publisher, while the notice posted by the county treasurer describes the land as consisting of sixty acres. We are clearly of the opinion that this misdescription of the property is, under the statute then in force, fatal to the validity of the sale and to the deed issuing thereunder. The Session Laws of 1891, page 286, which will be found in Mills' Annotated Statutes (Supplemental), Sec. 3882, requires that:

"The county treasurer shall before the 20th day of August of each year make out a list of lands and town lots subject to sale, *describing such lands and town lots as the same are described on the tax rolls.*" [Our italics.]

This, it will be seen, the treasurer did not do, since the tax roll described the land as containing one hundred sixty acres instead of thirty-six acres, as the description

in the published list reads. This was clearly a substantial departure from the statutory requirement.

The judgment is reversed and the case remanded for further proceedings in harmony with the views herein expressed.

Reversed and Remanded.

KING, J., dissents.

[No. 3859.]

GILBREATH v. DOE.

1. TAX TITLES—*Notice of Sale—Affidavit of Publisher.* The affidavit of the publication of the notice of a tax sale, required of the publisher by Rev. Stat., Sec. 5709, must contain not only what is specified in that section, but also the statement required by Rev. Stat., Sec. 3933. A tax deed issued pursuant to a sale, the notice of the publication of which is not shown in the manner required by the statute, to have been made in a newspaper of the class specified in the statute, is void.

2. —— *Void Deed—Sale En Masse of Contiguous Tracts Not Returned by the Same Person,* is void. (Rev. Stat., Sec. 5665.)

3. —— *Strict Compliance With the Statute,* must be shown to sustain a sale of land for the non-payment of the tax.

Error to the Rio Grande District Court. HON. CHARLES C. HOLBROOK, Judge.

Mr. IRA J. BLOOMFIELD, Mr. HARRY M. HOWARD, for plaintiff in error.

Mr. CHARLES M. CORLETT, Mr. GEORGE M. CORLETT, for defendant in error.

MORGAN, J.

This is an appeal from a judgment for plaintiff in an action to quiet title and setting aside two tax deeds.

The assignments of error are predicated upon the

validity of the deeds, both of which the lower court correctly held to be void.

First. The affidavit of the publisher followed the form prescribed by Sec. 5709, R. S.; Sec. 3884, M. A. S.:

"5709. *Publisher's Affidavit — Form — Sec. 182.* Every publisher or printer who shall publish such list and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication made by such publisher, printer, or some other person to whom the facts of publication shall be known, and no printer shall be paid for such publication who shall fail to transmit such affidavit within fourteen days after the last publication. Such affidavit may be substantially in the following form, to-wit:

"I., A..... B....., publisher (or printer) of the ....., a .....newspaper, printed and published in the county of ..... and state of Colorado, do hereby certify that the foregoing notice and list were published in said newspaper, once in each week, for ..... successive weeks, the last of which publications was made prior to the ..... day of ....., A. D. 19...., and that copies of each number of said paper in which said notice and list were published were delivered by carriers or transmitted by mail to each of the subscribers of said paper, according to the accustomed mode of business in this office.

A..... B.....,

Publisher (or Printer) of the ....."

However, the affidavit did not contain the statement, required by the following sections, 3931 and 3933, R. S. 1908; 1878a, 1878b, M. A. S.:

"*3931. In What Papers Legal Notices May Be Published—Sec. 1.* No legal notice, advertisement or publication of any kind required or provided by the laws of

the state of Colorado, to be published in a newspaper shall be published or have any force or effect as such unless the same be published in a newspaper printed in whole or in part, and published in the county in which such notice or advertisement is required to be printed, having a general circulation therein, and which said newspaper, if published weekly, has been continuously and uninterruptedly published in said county during a period of twenty-six consecutive weeks prior to the first publication of said notice or advertisement. * * *"

"*3933. Affidavits of Publishers—Sec. 3.* Every affidavit of the publisher of any such legal notice, advertisement or publication shall, in addition to the other matters required to be set forth therein by law, state that the newspaper in which such legal notice, advertisement or publication shall have been made, has been established for the length of time required, and is a newspaper within the meaning of this act."

Section 5709 was first enacted prior to the two latter sections, and re-enacted in 1901 and 1902, after the enactment of the two latter sections. The act of 1901 and 1902, that re-enacted the provision and the form of the affidavit contained in Section 5709, only repealed certain revenue acts referred to therein, together with all acts and parts of acts in conflict therewith, but made no reference to Sections 3931 and 3933 aforesaid. These sections were, however, neither specifically nor by implication, repealed, and the affidavit of a publisher in tax sale publications, as well as in all other legal notices, must contain the additional matter therein required. The affidavit might have been amended in this respect, but no amendment was asked or made. The deed was therefore void for such insufficiency of the affidavit of the publisher.

Second. Another fatal defect in the tax sale pro-

ceedings renders the deed void: The advertisement and sale *en masse* for a lump sum of several forty-acre tracts, assessed as "unknown" and valued and assessed separately. Although the tracts are contiguous, they were not returned by the same person as required by Sec. 5665, R. S. 1908; Sec. 3822, M. A. S., and the evidence disclosed that they were assessed as unknown, and valued and assessed separately. It has been distinctly held in *Page v. Gillett,* 47 Colo., 289, 292, 107 Pac., 290, that "the only land which the treasurer can sell jointly is such as the assessor can jointly value and assess, namely, adjoining parcels, returned by the same person. Further, the proofs show that this land was in fact separately assessed and valued in forty-acre tracts."

Many late decisions of this and of the supreme court require strict compliance with the statute in the sale of lands for taxes, where the owner seeks to quiet his title or recover his land. We call especial attention to the language quoted by Scott, P. J., in *McPherrin v. Paul,* 21 Colo. App., 154, 159, 160, 120 Pac., 1051, and by Cunningham, J., in *Empire Ranch & Cattle Co. v. Neikirk,* 23 Colo. App., 392, 128 Pac., 468, 469, quoting from *Charlton v. Toomey,* 7 Colo. App., 304, 43 Pac., 454.

The judgment is affirmed.

Affirmed.

[No. 3883.]

MASTERS v. CASSELL.

Judgment reversed without more, and the court below directed to dismiss the petition of appellee.

Error to Denver District Court. HON. HARRY C. RIDDLE, Judge.

Mr. GEORGE ALLAN SMITH, for plaintiff in error.

Mr. HENRY HOWARD JR., for defendant in error.

CUNNINGHAM, Presiding Judge.

This case has been before the court on a motion to dismiss the writ of error, at which time briefs were filed by both parties. Briefs on the merits have been also filed, and the case has been argued orally. The rules of law applicable to the facts in this case are too familiar to justify the preparation and filing of an opinion, and there are practically no disputed facts.

The trial court clearly committed reversible error, and the judgment will be reversed with instructions to the trial court to dismiss the petition of the defendant in error, Cassell.

Reversed and Remanded with Directions.

[No. 3884.]

WILMORE v. KALBERER.

1. LANDLORD AND TENANT—*Lease Construed.* A lease of farm lands provided that the landlord should furnish three horses, and that the tenant should "feed all teams at his own expense."

Held that the tenant was not entitled to charge the landlord for the care and feed of an animal actually worked and used on the premises, no matter how worthless.

2. TRIAL—*Pleading and Evidence—Matters Not in Issue.* To receive evidence of misconduct of plaintiff toward defendant, nowhere alleged in the pleading is error.

Error to Denver District Court. HON. HARRY C. RIDDLE, Judge.

MR. THOMAS B. STUART, MR. CHARLES A. MURRAY, for plaintiff in error.

Mr. R. D. REES, MESSRS. ALLEN & WEBSTER, for defendant in error.

HURLBUT, J., delivered the opinion of the court.

Action in the Denver district court by plaintiff (plaintiff in error) against defendant, to recover judgment for moneys laid out and expended for defendant, and for the value of goods, wares and merchandise received by him for plaintiff. Defendant pleaded a counterclaim and recovered judgment thereon, from which this appeal is prosecuted.

The pleadings show that defendant was in possession of certain farm premises described in the complaint, under a written lease from plaintiff, for one year, beginning December 1, 1905. The lease contains many covenants and agreements, some of which are as follows:

"And lessee shall pay as rent one-half (½) of all hay, grain and other produce raised on said ranch, shall do all necessary work to raise and harvest said crops, and furnish all tools, seed and machinery to do the work; and keep the small ditches in order, feed all teams at his own expense, and not use the said Wilmore's horses for any other purpose than actual work on the ranch. The hay shall be divided in the stack; the grain shall be divided as soon as it is threshed; and all grain belonging to the party of the first part shall be put in the granary or loaded on the car, and the party of the first part shall pay for the loading of his half; the apples to be sold by the party and the second part and the money be equally divided, and all other produce or income from said ranch shall be equally divided. Settlements shall be made in dividing all moneys immediately at the time the same is paid for. The party of the first part shall furnish three (3) horses, all the tools, machinery, wagons and harness now on the place; pay for seventy (70) inches

of water; pay one-half (½) the threshing bill and furnish one-half (½) of the seed and one-half (½) of the boxes or barrels for the apples, it being understood that nothing shall be sold off from the place before division without the mutual consent of the parties hereto, and settlements shall be made in dividing all money immediately at the time the same is paid for any hay, grain or produce when the same is sold off from the place, it being understood that the said Wilmore shall at all times have general supervision of the place as to the course to be pursued in general."

Defendant's answer contained a counter-claim to the effect that plaintiff was indebted to him in the sum of $59.60 for the care and keep of a mare named "Maud," from March 1 to June 10, and from September 1 to October 17, 1906, at a reasonable charge, as claimed, of 40 cents a day; for the sum of $220 for moneys expended in hiring a team to work on the ranch, made necessary by plaintiff's failure to furnish him with three horses to do such work; also for several small sums aggregating $9.53, making a total counter-claim of $289.13.

Defendant's evidence shows that he had been in possession of the ranch from December 1, 1904, to December 1, 1905, under a written lease substantially identical with the one now before us; that two horses, called "Bob" and "Barney," and the mare "Maud," were on the ranch at the time both leases were signed, and remained there throughout 1904, 1905 and 1906, except as to "Barney," who died in 1906; that Wilmore had four other horses on the place besides "Bob" and "Maud" during 1906, up to June 10th, at which time one team was taken away to haul lumber and never returned, leaving on the ranch two good horses that could work, besides "Bob" and "Maud"; that "Bob" and "Maud" worked there during the summer 1905, and some of the

time during 1906; that for 110 days in 1906 defendant hired a team to work on the ranch, and paid therefor $220, or $1 per day per horse.

The direct and cross-examination of defendant conclusively shows, by his admissions, that he owed plaintiff $161.21, which he sought to overcome by his counter-claim, and also that plaintiff furnished two serviceable horses during the term of the lease; hence, under defendant's own showing, plaintiff could not have been in default as to the third horse for more than $110 for the 110 days. The remaining $110 of the $220, subtracted from the counter-claim of $289.13, would leave it $179.13. This computation is based entirely upon defendant's evidence, ignoring that of plaintiff altogether, which shows an indebtedness from defendant to him of approximately $305. The item of $59.60 for feeding "Maud" is included in the counter-claim of $179.13. Under the terms of the lease defendant was precluded from asserting this item as a claim against plaintiff. The lease reads that the lessee (defendant) shall "feed all teams at his own expense." There is no ambiguity about this provision. The animal "Maud" had been used on the ranch as a farm and team horse during the entire term of the first lease, and was there at the time the present lease went into effect. It must have been within the contemplation of the parties that she would remain there for the full term of the new lease and be used as a team horse, hence defendant contracted to feed her at his own expense. To hold otherwise would violate the rule, that the terms and conditions of a written contract cannot be varied by parol. This covenant is not affected by another clause of the lease, *viz.*, "The party of the first part shall furnish three (3) horses, all the tools, machinery, wagons and harness now on the place," for whether the phrase "shall furnish three horses" refers to horses

then on the place or to any three horses plaintiff might choose to place thereon, is immaterial, as defendant contracted to feed all teams at his own expense. In the light of the evidence there can be no doubt that defendant realized he was obligated by the contract to feed all team horses on the place at the time the lease took effect. It is undisputed that from the time the lease began until June 10, 1906, plaintiff had on the ranch six horses, including "Bob" and "Maud," but no claim is made by defendant for feeding any of these animals except "Maud." Aside from what has just been said on this point we think the weight and force of the evidence is with plaintiff. It is undisputed that defendant worked "Bob" and "Maud" with other horses of plaintiff, throughout the season of 1905, but he testifies that those two animals became worthless and of no use as farm horses during the year 1906. The witness Williamson testified that he was employed by defendant in harvesting grain during August, 1906; that four horses belonging to plaintiff, *viz.*, "Bob," "Maud," "Fanny" and "Nellie," were on the ranch at that time; that he mowed and hauled hay with "Maud" and run the mowing machine with her and a mate, and worked both horses under instructions from defendant; that "Maud" was used for hard work on the farm while he was there, and that the only trouble with her was a swollen leg. Asmussen, defendant's witness, testified that he did not think her leg was any worse in 1906 than it had been in 1905. Defendant's witnesses Webster and Dibble testified that there was nothing the matter with the animal except a stiff leg, and that she was in fair condition, was not dead lame, but just limped, and that she was a good mare. Now the witnesses Sharp and Park, called by plaintiff, testified that they used "Maud" in 1907 for plowing and general farming purposes, and she did such work

satisfactorily and fairly well. It seems strange that she should render fair services as a farm horse in 1905 and 1907 but be incapacitated for any kind of farm work during the year 1906. Defendant does not deny that the witness Williamson worked "Maud" on the ranch in 1906 as stated, but says he did not do so at defendant's direction. Williamson was in defendant's employ at this time, and it is to be presumed that he was performing services for defendant and no one else. If he had been working the animal against defendant's desire, the latter would have stopped him from so doing. The evidence fairly shows that both "Bob" and "Maud" did considerable work upon and around the ranch in 1906, and were included in the six horses of plaintiff on the ranch when the lease went into effect. Under these circumstances defendant was not authorized to charge plaintiff for the care and keep of "Maud." Assuming the truth of defendant's statement that the animal was perfectly worthless as a farm horse during 1906, then he should have refused to use her for any purpose. It is stated in the answer that "at the instance and request of plaintiff" defendant kept and fed a certain horse, etc. Defendant was on the stand as a witness, but gave no testimony supporting this allegation. The item of $59.60 should have been deducted from defendant's counter-claim of $179.13. This would leave the counter-claim $119.53, which, subtracted from the admitted amount due plaintiff, $161.21, shows an indebtedness of $41.68 against defendant.

We think another error occurred during the course of the trial which is fatal to the judgment, *viz.:* Considerable testimony was permitted to go to the jury, under strenuous objections of plaintiff, concerning the alleged sale of a certain team by plaintiff. Defendant claimed this team belonged to him, and that he placed it in the

possession of plaintiff to make a sale thereof for defendant's benefit. The evidence so admitted on the part of defendant tended to show that plaintiff undertook to, and did, sell the team, but never accounted to defendant therefor. This evidence was highly prejudicial to plaintiff, and it is reasonable to presume had considerable bearing on the minds of the jury upon the rights of the parties. From such inadmissible testimony the jury might have been justified in presuming that plaintiff had wronged defendant out of this team. It is true that plaintiff denied the evidence of defendant in this respect after the court had permitted it to go to the jury, but as the jury apparently supported defendant in every issue, it is not unreasonable to suppose that they may have considered this team transaction as an aggravation of defendant's wrongs, and so entertained a doubt as to plaintiff's honesty and integrity. This testimony was in no sense admissible. There was no suggestion in defendant's pleadings that he had any claim whatever against plaintiff for moneys received by him from the sale of defendant's horses. Not a word can be found in the pleadings tendering such issue. The testimony concerning the transaction was in no way material to any other issue in the case. Its admission tended to no purpose but to prejudice the jury against plaintiff. It is suggested by counsel, however, that the testimony was material in some way as affecting the final settlement and accounting between the parties for matters arising out of the lease of the year 1905. We fail to discover its materiality. Both parties admit that the accounting for the year 1905, which showed a balance due from defendant to plaintiff of $68.79, was correct. There is no pleading by defendant suggesting that any mistake was made by the parties in making this settlement, nor that defendant desired a readjustment of such settle-

ment on the ground of fraud or mistake. The court would not permit any testimony showing the value of this team. This ruling was right, but it did not remove from the minds of the jurors the unfavorable impression against plaintiff which they might have possessed, as to his want of honesty in selling defendant's team without accounting to him for the proceeds. It really left them at liberty, if possessed of such impression, to guess at the value of the team, and charge it against plaintiff in their deliberations. We think the admission of testimony concerning the alleged sale of defendant's team was error, and that it affirmatively appears from the record to have been highly prejudicial to plaintiff's rights.—*Denver S. P. & P. R. Co. v. Wilson et al.*, 12 Colo., 20, 20 Pac., 340; *City of Pueblo v. Griffin*, 10 Colo., 366, 15 Pac., 616; *Denver Tramway Co. v. Reid*, 22 Colo., 349, 45 Pac., 348; *The Smuggler Union M. Co. v. Broderick*, 25 Colo., 16, 53 Pac., 169; *Loloff v. Sterling*, 31 Colo., 102, 71 Pac., 1113.

Other errors are discussed in the briefs, which we do not deem necessary to notice in this opinion, owing to the conclusions we have already expressed.

We have not attempted to construe that clause in the lease above quoted, relating to the furnishing of three horses, tools, etc. Even if that construction of the clause contended for by defendant be adopted, it would not change the result we have reached.

Both parties to this appeal appear to be men of modest means, and it is to be regretted on their account as well as that of the state, that this matter could not have been settled after the trial below. The voluminous record and printed matter indicates an expense to both of many times the amount involved.

Upon a consideration of the entire record, we think the verdict was so manifestly against the weight of evi-

dence as to show that it resulted from prejudice or a misunderstanding of the force and effect of evidence and the rules of law applicable thereto, and that the court erred in its rulings respecting those matters to which we have referred.

Reversed and Remanded.

[No. 3645.]

CARROLL ET AL. v. THE KIT CARSON LAND CO.

1. JUDGMENT—*Record as Evidence.* The record of the judgment is evidence only against the parties to the action.

2. CONVEYANCES—*Unrecorded—Effect.* One holding paramount title by a conveyance not recorded is not affected by a decree given in a cause to which he was not party, quieting title in another, under a treasurer's deed. The plaintiff, in whom title is so quieted is not a "subsequent bona fide purchaser or encumbrancer," within the meaning of the recording act (Rev. Stat., Sec. 694), nor is he in position to avail himself of the provisions of the code relating to the notice of suit pending (Code, Sec. 38), because his title is not derived from the same source.

3. STATUTES—*Construction.* The statute prescribing the effect of an unrecorded conveyance of land, and that providing for a notice of suit pending, are not to be so construed as to include persons not specified. The phrase "purchaser or encumbrancer," in each statute applies only to those claiming from the same source of title with the grantor in the unrecorded conveyance, or from the same source of title as the plaintiff in the cause in which the notice is filed.

Appeal from Kit Carson District Court. HON. JOHN W. SHEAFOR, Judge.

Mr. C. H. MILLER and Messrs. ALLEN & WEBSTER, for appellants.

Mr. LOUIS VOGT and Mr. P. B. GODSMAN, for appellee.

MORGAN, J.

This appeal is from a judgment of the Kit Carson district court against the plaintiffs in an action to quiet title to a quarter-section of land. The defendant relied upon two tax deeds, and a decree obtained thereupon in a prior action to quiet title against plaintiffs' grantor, instituted after plaintiffs received their deed from him for the land, but before they recorded it. They were not parties to the suit in which the said decree was obtained, and the default of their grantor was entered therein on service by publication.

The judgment should be reversed. The tax deeds were void, as held by the lower court, when offered in evidence by the defendant. The decree, pleaded, was of no effect as to the plaintiffs here, because they were not parties to that suit, and were not bound by the decree therein made for any other reason. A deed, though not recorded, is valid between the parties to it, and conveys the title absolutely, except that it shall not take effect, as required by our recording act, until filed for record, "as to subsequent *bona fide* purchasers and encumbrancers by mortgage, judgment or otherwise not having notice thereof" (Rev. Stat. 1908, Sec. 694), and except as to the effect such recording act may have upon the statute concerning notice of a suit pending, commonly called "notice of *lis pendens*," which provides that, "Only from the time of filing such notice shall the pendency of the action, suit or proceeding, be constructive notice of the action, suit or proceeding, to a purchaser or encumbrancer of the property described in the complaint, petition or answer."—Code of Civ. Proc., Rev. St. 1908, p. 80, Sec. 38. The defendant does not come within the class of persons protected by these provisions. It was not a subsequent *bona fide* purchaser or encumbrancer under the recording act, nor was it in a position, under the prior suit in which the decree, pleaded, was

made, to profit by plaintiffs' failure to record their deed. These statutes should not be strained nor extended beyond the legislative intent or the words used, so as to include anything not therein specified. Even if the recording act, Sec. 694, *supra,* were broad enough to include, or if it had contained, in addition to purchasers and encumbrancers, persons instituting actions and filing notice of suit pending, it would not, even then, avail the defendant, plaintiff in the prior suit, anything, because it did not obtain title from the same grantor, as distinctly pointed out in the following authorities.

The defendant here, as plaintiff in the prior suit, claimed title under a purchase from the county at a tax sale, and the decree, pleaded, was obtained by virtue of such purchase. Its interest was not derived from, nor connected with, the estate conveyed by the unrecorded deed, within the meaning of the exceptions in our recording act.—*Tinsley v. Atlantic Mines Co.,* 20 Colo. App., 61, 77 Pac., 12.

In the case just cited, the court, quoting, said (p. 63):

"A tax title, from its very nature, has nothing to do with the previous chain of title; does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deed; the former title can be of no service to him, nor can it prejudice him."

And, defining the effect and purpose of our recording act, our supreme court has said:

"A deed duly recorded is constructive notice of its existence, and of its contents, to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons.—3 Wash. R. P., 319, Sec. 53. In the case of *Maul v. Rider,* 59 Penn., 167, Sharswood, J., says: 'That the

record of a deed is constructive notice to all the world, is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it as subsequent purchasers and mortgagees, and all others who deal with it on the credit of the title in the line of which the recorded deed belongs.' "—*Gillett et al. v. Gaffney et al.*, 3 Colo., 366, cited in *Smith v. Russell*, 20 Colo. App., 554, 558, 80 Pac., 474, and in *Judd v. Robinson*, 41 Colo., 222, 229, 92 Pac., 724.

In the case of *Hallett v. Alexander*, 50 Colo., 37, 45, 114 Pac., 490, our supreme court, through Justice White, discussing Section 694, *supra*, said:

"It is claimed the contest here is not between claimants from a common source of title, and that the statute operates, and is intended to operate, only in such cases. We are persuaded that the statute applies only as between claimants from a common source of title."

It was also said by Cooley, J., in *Smith v. Williams*, 44 Mich., 240, 242, 243, 244:

"The defendants below, to show title in themselves, offered in evidence the enrolled record and proceedings in a cause, * * * instituted by Sextus N. Wilcox as complainant against Byron F. Squires as defendant, * * * in which Wilcox claimed title to the land under certain alleged conveyances on sales thereof for delinquent taxes, and prayed the court of chancery to quiet his title as against the claims of Squires. It appeared from the enrollment that Squires was proceeded against as a non-resident; that he was brought in by publication, and did not enter an appearance or file any pleading, and that a decree that the title of Wilcox to the premises be quieted as against any claim of Squires was entered. * * *

"It will be observed that Byron F. Squires alone was made defendant in the chancery suit, and that he

had at the time no title to the land. The decree was that he be thereafter precluded from asserting title, and we are not informed that he does so. Obviously the claim of title which the complainant made was to Squires a matter of indifference, since it could not in any manner affect his interests. The tax titles had accrued after he conveyed, and enforcing them neither took from him anything, nor made him liable upon his covenant. Therefore, if knowledge of the suit had come to him, he would probably have given it no attention, because the result of it could not concern him. The decree as to him might as well have been left unmade.

"It is said, however, that this suit against a party who had no interest to be affected by it, and no occasion to defend it, has been effectual to cut off the right of the party actually concerned, and who probably never heard of it until the decree was presented which was to be conclusive against him. The only reason given for this position is that the plaintiff, by not recording her deed, and suffering Byron F. Squires to appear of record as apparent owner, 'has allowed him to appear to the world as the owner of the land now sought to be recovered by her,' so that 'Squires' day in court was her day, and she must accept the consequences of her own act.' It is, then, upon her failure to place the evidence of her title upon record that this effect of the decree upon her rights is to depend.

"The general rule that a judgment or decree binds those only who are parties to it is not disputed. There are a few well-understood exceptions, of persons who, subsequent to the institution of the suit, have acquired interests or claims under the parties; but the plaintiff was not one of these, for her title had accrued before. If she loses her title, then it must be by force of the recording laws; for independent of these there is no

principle of law that could bind her by the judgment against one whose interest she had acquired long before the suit was instituted.

"But the recording laws could not help the defendants. Those laws point out specifically the danger to which the party failing to record his title is exposed, and the courts cannot extend or add to it.—*Columbia Bank v. Jacobs,* 10 Mich., 349; *Millar v. Babcock,* 29 Mich., 528. The danger is indicated by Sec. 4231 of the Compiled Laws: 'Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.' By 'subsequent purchaser' in this section is meant a subsequent purchaser from the same grantor. Mr. Wilcox was not such a purchaser. He does not claim under Squires, but by conveyances from the state which, if valid, should cut off the Squires title altogether."

See also *Hammond v. Paxton,* 58 Mich., 399, 25 N. W., 321, a case decided after the statute was changed omitting the valuable consideration feature of the act. See also *Warnock v. Harlow,* 96 Calif., 298, 31 Pac., 166; 25 Cyc., 1480; *Grant v. Bennett,* 96 Ill., 513.

It is unnecessary to the disposition of this appeal to consider the question raised as to whether the words "subsequent *bona fide* purchasers and encumbrancers," under our recording act, refer only to those who become such for a valuable consideration.

The only benefit that would have been derived in the prior suit in which said decree was made, if plaintiffs' deed had been of record, would have been the knowledge the plaintiffs therein might have obtained, if they had seen the record, that these plaintiffs were

proper parties defendant, but recording is not necessary or required for such purpose. Such record would not have been in any way beneficial to plaintiffs herein, nor would it have precluded the defendant in any way from obtaining any lawful relief. If such record had caused these plaintiffs to be made defendants in that suit, they could have defeated the cause and prevented any decree, because the tax deeds, upon which the decree was rendered, were void, as held by the court in the instant case, when offered in evidence by the defendant herein. Hence, the defendant is complaining of the failure to do a thing, the doing of which would have been perilous to it.

There are opinions from other states having different recording acts, and different provisions in acts requiring notice of suit pending, and rendered under different facts, as, where the two contending titles were derived from and through the same grantor, but they are not opposed to the conclusions reached herein. If the decree relied upon by defendant herein had been entered upon a deed, duly executed and recorded, from, through, or under, the same grantor, named in the plaintiffs' unrecorded deed, it would have then become necessary to decide the question as to whether such a decree would have been a good defense herein, and whether a person, holding an unrecorded deed at the time a suit is brought, and notice of *lis pendens* filed, to quiet title by a third party against the grantor in said unrecorded deed, is a purchaser *pendente lite,* or, as our statute says, *supra,* "from the time of filing such notice" of action pending, but such was not the case, a tax title is not derived from, through, or under, the owner of the property taxed, within the meaning and purview of our recording act.—*Tinsley v. At. Min. Co.,* and cases cited, *supra.*

In the case of *Norton v. Birge,* 35 Conn., 250, and the dissenting opinion of Judge Dickey in the case of *Grant v. Bennett,* 96 Ill., 513, relied upon by appellee, the contending titles were derived from the same grantor. And in the cases of *Collingwood v. Brown,* 106 N. C., 362, 10 S. E., 868, and *Hoyt v. Jones,* 31 Wis., 389, the contending titles were from the same grantor, and the statutes of North Carolina and of Wisconsin, as quoted in appellee's brief, concerning *lis pendens,* provide that a person holding a conveyance, "subsequently executed, or subsequently *registered,* shall be bound by the proceedings," the same as if made a party.

The Maine and Kansas cases, and some others, cited by appellee, are not in point, because those states have statutes that provide that an unrecorded deed is *void* as to *all other persons* than the parties thereto and those with notice thereof, thus rendering the unrecorded deed under consideration *void,* under those statutes, as to this defendant, because the defendant comes within the class of *all other persons;* while, under our statute, an unrecorded deed is *valid* as to *all other persons* than subsequent purchasers, etc., without notice, thus rendering the unrecorded deed under consideration *valid,* under our statute, as to the defendant, because it comes within the class of *all other persons,* and does not come within the exception.

Bennett, in his treatise on the law of *lis pendens,* says, Sec. 294:

"As we have seen, most of the recording acts declare what legal effect shall be given to recording or registration, but in some of the states it is left to the courts to declare what effect shall be given to the registration or record of recordable instruments. Most of the statutes declare that conveyances shall be valid between the parties thereto and those acquiring knowledge of their exist-

ence, whether recorded or not. Such would clearly be the law were the statute silent on the subject.

"Upon the question as to whether other classes than those who are *bona fide* purchasers without notice shall be protected against unrecorded instruments, the statutes themselves, as we have seen, vary, and the decisions of the courts in the various states, as we would naturally suppose, also vary."

The judgment of the lower court is therefore reversed, and the case remanded, with directions to enter judgment for the plaintiffs, quieting their title, setting aside the tax deeds relied upon by defendants, and letting the judgment say that the decree, pleaded, is of no effect as to plaintiffs' title, upon the payment by the plaintiffs to the defendant of such taxes, penalties, value of improvements, if any, etc., required by statute, Sec. 5733, Rev. St. 1908, in reference to the recovery of land sold for taxes, the amount of which to be determined by further proof in this action, or by stipulation, as the court may be advised.

Reversed.

[No. 3658.]

HALL v. JACKSON.

1. DAMAGES—*Mental Suffering—When an Element of Damage.* The cases in which substantial damage is awarded for mental suffering, not attended by injury to the person, examined, and *held* that mental suffering, the result of the mere passive breach of a contract, of one not engaged in a business of a *quasi*-public nature, the breach not being attended by any wanton, wilful or oppressive conduct, will not sustain an award of substantial damages.

That nominal damages may be awarded. *Bleecker v. Colorado, etc., Co.*, 50 Colo., 140, distinguished.

2. APPEALS—*Costs.* Judgment for compensatory damages where only

nominal damages were allowable reversed. Costs taxed against appellant.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. HALSTED L. RITTER, for appellant.

Mr. GEORGE P. STEELE, for appellee.

HURLBUT, J., delivered the opinion of the court.

Appellee (plaintiff below) instituted action August 3, 1909, against appellant, to recover damages for the alleged negligence of defendant in preparing a body for shipment to Pennsylvania, and recovered judgment for $1,000, from which this appeal was taken.

In harmony with the allegations of the complaint, plaintiff's evidence tends to show that she was the widow of Charles D. Jackson, who died in Denver June 28, 1909, from injuries received in a street car accident; that defendant was an undertaker of many years' experience, conducting undertaking parlors at the time the cause of action arose; that on June 29, 1909, defendant agreed and undertook to properly prepare for shipment to Pennsylvania the body of said Charles D. Jackson, and, notwithstanding the body was shipped by the most direct route from Denver to its destination in Pennsylvania, it arrived there in an advanced state of decomposition; that the odor arising from the body contained in the casket was so offensive and disagreeable that it became necessary to leave the casket in the open air near the house while the funeral ceremonies were being conducted therein; that the ceremonies were attended by seventy-five or one hundred friends, but the remains could not be viewed, owing to the bad condition of the body; that mortification was due to the negligent and unskillful manner in which the body was prepared for shipment by defendant, by reason of which plaintiff suffered great and

trying mental anguish, humiliation and distress of mind. The undisputed evidence also shows that an autopsy was performed upon the body, without objection, and the heart, liver, kidneys, stomach and spleen removed therefrom, and, after examination, replaced therein, whereupon defendant prepared the same for shipment.

Defendant interposed a general demurrer to the complaint, which was overruled. Defendant then filed his answer admitting the contract and agreement to do and perform all things necessary for the proper preparation of the body for shipment, but he therein denied the charge of incompetency or negligence in the proper preparation of the same, as stated in the complaint, and alleged that he prepared the body for shipment in accordance with the contract, by using the best scientific methods known, applying the best embalming fluids known to the trade, and using every possible precaution in so doing.

The only damages prayed for in the complaint was $10,000 for mental anguish, distress and humiliation, suffered by plaintiff, and for costs.

Both parties to the action concede that the controlling issues of this appeal are based upon the action of the court in overruling the demurrer to the complaint, and the amount of the verdict. The demurrer raises the question: Will an action lie for breach of contract, against a defendant not engaged in business of a *quasi*-public nature, to recover substantial damages, founded only upon mental anguish, humiliation and distress of mind, where the breach is unattended by physical injury to the party bringing the action, and where there is an absence of wanton or willful conduct on the part of the one violating the contract?

It will be noticed that this action is not based on a statute, nor does the complaint seek to recover moneys paid to defendant for services negligently performed, nor

for exemplary damages. The answer does not plead a counter-claim. As far as the pleadings are concerned, both parties seem to stand upon their respective legal rights as construed by them, the plaintiff contending for her right of action based upon mental anguish, humiliation and distress, caused by defendant's failure to carry out his contract, while defendant maintains that even if he is guilty of a breach of contract it was unintentional on his part, hence no cause of action for substantial damages will lie in favor of plaintiff. There are authorities of repute which support the law as contended for by both parties, although our attention has not been called to any decision of our own state entirely in point. From a careful review of the decisions and text-books we believe the general current of authority tends to establish the rule in this class of cases that: (a) In cases of pure tort, where no contractual relations exist and the acts complained of are attended with willful and wanton conduct on the part of defendant, substantial damages may be recovered for mental anguish and suffering only, though no physical injury or pecuniary loss is suffered by plaintiff; (b) in cases where a breach of contract has occurred and the acts attending such breach are accompanied by willful, insulting or wanton conduct of the one guilty of the breach, substantial damages may be recovered for mental suffering only; (c) in cases where a breach of contract has taken place and the one committing the breach was not engaged in business of a *quasi*-public nature, and the negligence consisted of a mere passive breach, unintentional, and unaccompanied by any acts of wantonness, willfulness or insult, on the part of the one committing the breach, an action for substantial damages, founded alone upon mental anguish and suffering, cannot be sustained; the rule stated being predicated, of course, upon the absence of a statute on the subject.

In the case at bar plaintiff's pleadings nowhere contain any allegation or charge against defendant of willful, intentional or wanton acts on his part, in respect to the breach with which he is charged. In fact, all the pleadings and evidence disclose at the most a mere passive breach of the contract, based upon unintentional negligence in the preparation of the body for shipment.

It may be said with safety that at common law no action could be maintained to recover for mental suffering in the absence of bodily injury occasioning such suffering.—*Black v. Atlantic Coast Line R. Co.,* 82 S. C., 478, 64 So., 418; *Summerfield v. W. U. T. Co.,* 87 Wis., 1, 57 N. W., 973. The federal courts incline to a rigid enforcement of the common law rule. It is said in *Kyle v. Chicago, R. I. & P. Ry. Co.,* 182 Fed., 613, 105 C. C. A., 151:

"Mental anguish alone, not arising from some physical injury or pecuniary loss, caused by the negligent or other wrongful act of another, is not a basis for an action for damages in the absence of a statute authorizing such a recovery."

Notwithstanding the common law rule, the courts of this country have generally allowed compensatory damages to be recovered for mental suffering alone in certain classes of cases. Most of such classes of cases are well stated in *W. U. T. Co. v. Rogers,* 68 Miss., 748, 9 So., 823, 13 L. R. A., 859, 24 Am. St., 300, *viz.:*

"(1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance is that the one cannot be separated from the other. (2) In actions for breach of the contract of marriage. (3) In cases of wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party."

In *Summerfield v. W. U. T. Co., supra,* in commenting on the above excerpt, the court says:

"To this latter class belong the actions of malicious prosecution, slander and libel, and seduction, and they contain an element of malice. Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case—certainly no well-considered case—prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages."

In *Carter v. Oster et al.,* 134 Mo. App., 146, 112 S. W., 995, plaintiff sued Oster and other members of a trade union, and recovered for mental suffering as well as for the injury, basing his action upon defendants' wanton and willful acts in preventing plaintiff from securing employment as a steam and hot water fitter, causing his discharge by contractors and others through the imposition of fines upon them, and threatening strikes in case they refused to discharge him. The evidence showed defendants had persecuted, maltreated and insulted him, and indulged in all manner of means to prevent him from securing employment. The court said:

"But as already said, the testimony conduces to show the conduct of the defendants was not only wrongful, but wilful, malicious and oppressive; and it is generally held mental suffering due to torts of that nature is an element of damages. Defendants' counsel contends there can be no award for mental suffering unconnected with a physical injury; which is true in actions for negligent wrongs and wherein the conduct of the defendants does not exhibit malice, insult or inhumanity. * * * But there are torts of which mental distress is the proximate cause and natural result, and for which damages may be assessed. Such are malicious prosecutions, slanders and wilful trespasses to the person, either with or

without physical injury; for instance, the unlawful ejection of a passenger from a train."

In *Gratzow v. Buening,* 106 Wis., 1, 81 N. W., 1003, 49 L. R. A., 475, 80 Am. St., 1, the action was based upon a conspiracy, carried into effect by defendant and others, by which the plaintiff was caused great mental suffering and distress. Plaintiff employed defendant to convey the body of his child to the cemetery from his residence. Just as the plaintiff was ready to place the casket in the hearse, defendant, by his servant, drove away with the hearse. Defendant and others caused this to be done because the livery stable keeper who furnished the hearse to the undertaker Nieman had done so in violation of the by-laws of the livery stable keepers' association. The court reversed a judgment for plaintiff, using this language, *viz.:*

"In this case there was no physical injury to plaintiff, and no personal injury to him of any kind save to his feelings. The case does not fall within the few exceptions to the rule—which prevails in this state and in most jurisdictions—that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that, under the general principle applicable to tort actions that recoverable damages are limited to such as are the natural and proximate result of the act complained of, some physical injury is necessary to a definite casual connection between the wrongful act and the mental condition, to render the former, in a legal sense, the cause of the latter, and such condition, with its immediate cause, sufficiently significant to be comprehended and measured with a reasonable degree of certainty."

Wilcox v. Richmond & D. R. Co., 52 Fed., 264, 3 C. C. A., 73, 17 L. R. A., 804, was an action brought by plaintiff to recover for mental suffering and distress of mind, by reason of the failure of defendant company to promptly transport plaintiff to the bedside of his father,

who was seriously ill. The court denied the right of recovery in plaintiff, using this language:

"The authorities are substantially agreed on the proposition that pain of mind, as distinct from bodily suffering, can be considered in actions for damages from injuries to the person, and for pecuniary loss and expense or like causes, incident to such injuries. But we know of no decided case which holds that mental pain alone, unattended by injury to the person, because of simple negligence, can sustain an action."

Birmingham Waterworks Co. v. Vinter, 164 Ala., 490, 51 So., 356, is founded upon an action brought by plaintiff Vinter against the company for breach of contract in failing to supply him with water, whereby his feelings were greatly outraged and distressed. The court held that his mental anguish alone could not support the action, saying that "mental anguish was not a recoverable element of actual damages growing out of a mere breach of the contract."

Beaulieu v. Great Northern Ry. Co., 103 Minn., 47, 114 N. W., 353, 19 L. R. A. (N. S.), 564, 14 Ann. Cas., 462, was a case wherein plaintiff, Beaulieu, sought to recover from the railroad company for mental anguish caused by the failure of the company to promptly forward the body of plaintiff's child from the place of its death to Ogahmah, Minnesota, alleging that the company wrongfully and negligently carried the body beyond the station where it should have been left, thus delaying the funeral arrangements for twenty-four hours, and causing the body to become badly decayed, mutilated and damaged. No willful or intentional misconduct was charged on behalf of defendant or its agents, and no claim was made for actual damages. The court held that an action could not be maintained to recover for mere mental anguish, as it was not shown that the acts of the company were of a wanton, malicious or willful nature. The following are

some excerpts from the opinion, which is well considered and somewhat exhaustive, *viz.:*

"It is also a rule of general application that mental anguish is not a proper element of damage in actions for breach of contract, though there is a class of wrongs arising out of contractual relations in which this element is permitted to enter. Illustrations of this are found in wilful and unlawful injuries to passengers upon railroad trains. * * *

"Summarizing, it may be said that mental anguish is a proper element of damages in all actions sounding in tort, where the plaintiff has received some physical injury, or his legal rights have been so willfully invaded as naturally to cause mental distress. It is an element to be considered in actions for a breach of contract in exceptional cases only; the principal exception being the telegram cases already referred to. * * * Such damages (sounding in tort) are not recoverable in actions for breach of contract, except, perhaps, in those exceptional cases where the breach amounts to an independent willful tort, in which event they may be recoverable under proper allegations of malice, wantonness, or oppression. * * * They cannot be recovered in actions involving ordinary negligence, where no physical injury results. * * * The complaint before us charges, at most, a negligent failure to perform the contract, for the breach of which damages for mental anguish are demanded, and the case is not brought within those wherein such damages are awarded for the malicious and wanton breach, to which we have adverted. * * * If damages for mental anguish may not be recovered in actions wholly in tort, where the parent suffers untold grief at the disfigurement of his minor child, or because of his death by the wrongful act of another, or in actions for libeling the dead, as indicated by the authorities cited, by what course of reasoning, from the viewpoint of legal principles unin-

fluenced by feelings of sentiment or resentment, can it be held that they may be recovered, in an action like that at bar, for the mere negligence of a railroad company in carrying a corpse beyond the station of its destination, resulting in no injury to the body, save such as arises from a natural tendency to decomposition? We discover none."

Both appellant and appellee, in support of their positions, cite *Bleecker v. C. & S. Ry. Co.*, 50 Colo., 140, 114 Pac., 481, 33 L. R. A. (N. S.), 386. As we interpret this decision it is not directly in point for either party. The action arose out of insulting and abusive language used by the conductor of one of defendant's trains, to a passenger rightfully thereon. No physical force or violence was used, nor did plaintiff receive any physical injury. A general demurrer was interposed to the complaint and sustained by the court, from which ruling an appeal was taken. The supreme court reversed the district court and committed the court to the rule that compensatory damages can be recovered in such case for mental pain and mortification suffered by the one subjected to such treatment, though he received no physical injury, and no force or violence was offered on the part of defendant's agent. It was further held that, though there might be difficulty in determining the proper measure of such damage, that fact would not deprive the passenger of his remedy. The ruling is based upon the reasoning that defendant company, engaged in business of a public nature, owed a duty to use reasonable effort to protect its passengers from insult and abuse while traveling; that if its servants offer such indignity to passengers the defendant becomes liable and thereby violates such duty, which constitutes a tort, for which action for mental suffering will lie. Justice Gabbert, in rendering the opinion of the court, conceded, however, that there were authorities holding to a rule opposed to

that there announced. The following excerpts are taken from the opinion:

"We conclude that the use by a conductor to a passenger lawfully upon a train and conducting himself with propriety, of language calculated to humiliate, mortify or disgrace the passenger gives the passenger a right of action against the railroad company for compensatory damages for the mental pain thus occasioned."

and on petition for rehearing as follows:

"When there is a wilful, tortious breach of the contract of carriage by those engaged in serving the public, it is certainly illogical to say that the person whose rights are thus infringed is without remedy for mental suffering thus caused, unless such breach is accompanied by some other element of damage. * * *

"The remaining cases cited, which hold that damages are not recoverable for mental suffering alone, are distinguishable from the one at bar, in that they relate to cases brought under a statute similar to our own, or where contractual relations did not exist between the parties, or where there was a mere passive breach of a contract; that is to say, if there had been a violation of the contract, it was not occasioned by wilful, tortious conduct, or were for simple negligence, or where the mental suffering was not the direct result of a tort, but remote, or the defendant was not engaged in a business *quasi*-public."

Appellant also cites *Diamond Rubber Co. v. Harryman,* 41 Colo., 415, 92 Pac., 922. This case is hardly in point. It was not founded on contract. Plaintiff sued the company for damages caused by plaintiff's stumbling over a piece of pipe projecting above the sidewalk in front of premises occupied by defendant. Plaintiff received injuries from the fall, and became a permanent cripple, his leg being appreciably shortened by the injury.

In addition to actual damages suffered by him, and for bodily pain caused by reason of the injury, he sought to recover for mental suffering from his disfigurement and humiliation resulting therefrom. Plaintiff recovered judgment in the court below, but the same was reversed for errors committed in the giving and refusing of instructions. One given asserted the right of plaintiff to recover for mental suffering occasioned by the disfigurement. The court held such instruction to be error, and that, under the facts of the case, damages for mental suffering caused by the disfigurement, where no malice or wantonness were shown, could not be recovered, expressing no opinion as to whether such disfigurement would sustain a cause of action for mental suffering only if the same be offensive to others, or subject those so afflicted to their compassion or ridicule.

Many other cases could be cited holding to the views expressed in the foregoing cases. Other courts of high repute, however, sustain the right of recovery for mental suffering alone in cases similar to the one at bar, of which the following is a partial list: *J. E. Dunn & Co. v. Smith,* 74 S. W., 576 (Tex.); *Lindh v. G. N. Ry. Co.,* 99 Minn., 408, 109 N. W., 823, 7 L. R. A. (N. S.), 1018; *Louisville N. R. R. Co. v. Hull,* 113 Ky., 561, 68 S. W., 433, 57 L. R. A., 771; *Koerber v. Patek,* 123 Wis., 453, 102 N. W., 40, 68 L. R. A., 956; *Wright v. Beardsley,* 46 Wash., 16, 89 Pac., 172; *Renihan et al. v. Wright et al.,* 125 Ind., 536, 25 N. E., 822, 9 L. R. A., 514, 21 Am. St., 249. It will be noticed that these cases vary to some extent as to facts. In some, contractual relations between the parties are wanting; in others, the negligence complained of is accompanied by willful and wanton conduct on the part of defendant; and some show the defendant was engaged in a business of a *quasi*-public nature. Some sustain the right to recover upon the ground that, where

by the nature of the contract the parties must have contemplated that a breach thereof would necessarily cause mental suffering to the party affected thereby, compensatory damages will be allowed for such suffering alone, reasoning that in such cases the party offending is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrued through his default.

There are many cases known to the profession as "Telegraph Cases," which hold that actions can be maintained for mental suffering alone founded upon failure of the telegraph company to promptly deliver death messages sent in the usual course of business, particularly where the direct and natural result of such failure entails mental suffering and anguish upon the sender, viz.: *W. U. T. Co. v. Long,* 148 Ala., 202, 41 So., 965; *W. U. T. Co. v. Carter,* 2 Tex. Civ. App., 624, 21 S. W., 688; *W. U. T. Co. v. Crowley,* 158 Ala., 583, 48 So., 381; *W. U. T. Co. v. Giffin,* 27 Tex. Civ. App., 306, 65 S. W., 661; *Lyles v. W. U. T. Co.,* 77 S. C., 174, 57 S. E., 725. The rule permitting such recovery is known as the "Texas Doctrine," but the weight of authority appears to be against recovery in such cases.

As this question, under the facts here presented, is of first impression in this jurisdiction, our conclusions should be, and are, influenced by the views of our supreme court and legislature upon the doctrine of "recovery for mental suffering alone," so far as the same can be ascertained by previous decisions and legislative enactments. It seems that the doctrine does prevail, as our legislature has enacted a law making the infliction of mental suffering, as well as physical injury, a ground of divorce. Even before the passage of that act some decisions of the supreme court indicated a tendency to favor the doctrine. The Bleecker case extends the rule to cases of wanton insult offered to passengers traveling on trains of common

carriers. We have no intimation, however, from the supreme court or legislature upon the doctrine as applicable to such a state of facts as now before us.

After reviewing the authorities we have reached the conclusion that, in a case of this character, substantial, compensatory damages for mental suffering only cannot be recovered in an action for breach of contract where the acts constituting the breach consist of simple negligence in the performance of the contract, unless it be shown that defendant's conduct in the premises was characterized by wilfulness or wantonness.

We are satisfied that the decided weight of authority sanctions the conclusions we have reached, and are convinced that such authorities are founded on sounder reasoning, and calculated to be of more substantial benefit to the public at large, than those holding to the contrary. We are inclined to suggest that if the people generally believe compensatory damages ought to be recoverable in cases of this nature it is infinitely better to give expression to such belief by securing a law to that effect, either through initiative petition or legislative enactment. Such a law could define what cases should be considered within the doctrine and definitely fix the amount recoverable. The jury and courts would thus be relieved of the unpleasant duty of trying to measure in dollars and cents the degree or extent of mental suffering in such cases.

For the reasons given, plaintiff is not entitled to recover substantial or compensatory damages for her mental suffering. The complaint, however, states a good cause of action in that it charges a breach of contract, which is sustained by the evidence, entitling plaintiff to nominal damages. The judgment being for *compensatory* damages in a very substantial amount, instead of for nominal damages, is excessive, and must be reversed and the cause remanded, but all costs will be taxed to the appellant.

[No. 3666.]

TEBOW V. TELLER ET AL.

EJECTMENT—*Complaint—Plaintiff's Title.* The complaint in an action for the recovery of lands must comply with the provisions of the code (Mills' Code, Sec. 267; Rev. Code, Sec. 286). A complaint averring the filing by plaintiff with the state engineer, on a day named, of a preliminary map and description of a reservoir site, upon particular lands described; the commencement of work thereon within six days thereafter; the diligent prosecution thereof, and continuous peaceable possession until ousted; that plaintiffs had "endeavored to find the owners of the fee in such lands, for the purpose of purchasing or condemning the same," and that "the estate of plaintiff * * * consists of a lawful filing for a reservoir site, under the law, with the right by purchase or condemnation proceedings to acquire the said land from the owners," shows no estate whatever in plaintiff, and is not a compliance with the statute.

Semble that the statute of Forcible Entry might be successfully invoked.

Appeal from Pueblo District Court. HON. C. S. ESSEX, Judge.

Mr. THEO. H. THOMAS, for appellant.

MESSRS. DUGAN & BRAYTON, and Mr. HARRY E. PRATT, for appellees.

HURLBUT, J., delivered the opinion of the court.

April 5, 1910, appellant (plaintiff below) filed his second amended complaint against appellees for possession of a reservoir and reservoir site. Neither the abstract nor transcript of record shows when the suit was commenced, but, for the purpose of deciding this appeal, we will assume the suit to have been begun on the date mentioned.

The complaint alleges substantially that at all times mentioned therein plaintiff is and was the owner and entitled to the possession of The Pueblo Reservoir and Reservoir Site, situate in Pueblo county; that the reservoir

and reservoir site embrace certain lands, therein described; that plaintiff did not own the fee title to the lands mentioned, but had endeavored, both before and after the suit was brought, to find the owners of the fee title thereto, for the purpose of purchasing or condemning such fee title; that the estate of the plaintiff in said property and premises consists of a lawful filing for a reservoir and reservoir site under the law, with a right either by purchase or by condemnation proceedings to acquire the fee title thereto; that on March 6, 1907, plaintiff located and filed upon said reservoir and reservoir site, and, on August 12, 1907, filed a preliminary map and statement of the same with the state engineer; that ever since March 6, 1907, to the time he was ousted by defendants, he had been in the quiet and peaceable possession and enjoyment of said reservoir and reservoir site; that plaintiff never abandoned or forfeited his right or claim to the same; that he commenced constructing said reservoir on March 12, 1907, and has at all times diligently prosecuted the work of constructing and building the same; that plaintiff is entitled to the immediate possession of the reservoir and site; and that the same were of the value of $60,000. The complaint further alleges, on information and belief, that in January, 1909, defendants, without right or authority, without the knowledge or consent of plaintiff, and against his wishes, wrongfully took possession of the reservoir and site, deprived plaintiff of the use and possession of the same, and are still in such possession; that defendant, The Teller Reservoir and Irrigation Co., a Colorado corporation, was organized after the ouster of plaintiff as aforesaid; that on or about April 6, 1909, defendant, John C. Teller, conveyed or caused to be conveyed to said company The Pueblo Reservoir and Reservoir Site, and that, at the time, the company had knowledge of plaintiff's right, title, interest and ownership, in and to the same; that ever since

June 1, 1909, the company, in common with its co-defendants, has held possession of the reservoir and site against plaintiff; that plaintiff did not learn of the organization of said company, and the transfer to it of the reservoir site, until on or about March 1, 1910. Prayer that the company be made party defendant; that injunction issue, restraining defendants from interfering with the reservoir and site, or plaintiff's possession and right of possession to the same; that defendants be directed to turn over possession of the reservoir and site to plaintiff; that defendants be declared to be trespassers on plaintiff's property; that, if possession cannot be delivered, plaintiff have judgment for the value of the reservoir and site in the sum of $60,000; and for general relief.

A demurrer was interposed to the complaint, alleging, among other things, that the same did not state facts sufficient to constitute a cause of action. Upon hearing the demurrer was sustained. Plaintiff elected to stand on his amended complaint.

It seems to be clear from the complaint that at the time suit was brought plaintiff was out of possession of the lands described therein and out of possession of the so-called reservoir site, and that he sought to regain possession by and through the action commenced by him. Appellees contend, and it seems to be conceded by appellant, that this action is founded upon sec. 265, Mills' Annotated Code. That section provides, among other things, that:

"An action to recover the possession of real property may be brought in any case where an action of ejectment or a writ of right might have been brought at common law, and in any case where the plaintiff claims a legal estate in real property or lands, in fee, or for life, or for years, or claims the legal right to occupy and possess the same," etc.

Section 267, *ib.*, reads, in part, as follows:

"The plaintiff, in his complaint, shall set forth the nature and extent of his estate in the property and state whether it be in fee, for life, or for the life of another, or for a term of years, and specifying such life or the duration of such term; or, if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the State of Colorado, or otherwise, the complaint shall contain a brief statement of such possessory claim," etc.

It will be observed that anyone relying upon this kind of an action must allege in his complaint, "the nature and extent of his estate in the property, and state whether it be in fee, for life, or for the life of another, or for a term of years, and specifying such life or the duration of such term," and further:

"The plaintiff shall also state that he is entitled to the possession of the premises, and that the defendant wrongfully ousted the plaintiff, or wrongfully withholds the premises from him, or both, as the facts may be," etc.

We think the complaint in this case fails to comply with the requirements of the code, in that it shows on its face that plaintiff has no title or right of possession in and to the land covered by the reservoir and reservoir site. It fails to set forth the nature and extent of plaintiff's estate in the land embracing the reservoir and reservoir site, unless the following allegation can be so considered, which is the only one that attempts to allege such estate, viz.:

"The estate of the plaintiff in said property and premises consists of a lawful filing for a reservoir and reservoir site, under the law, with a right either by pur-

chase or by condemnation proceedings to acquire the fee title to said land from the owners."

This is not equivalent to the statement required by the code, and, further, there is a total absence of a statement as to whether the estate claimed by plaintiff is "in fee, for life, or for the life of another, or for a term of years," as the code requires. The averments of the complaint show that plaintiff has no interest, title or right of possession in or to the land upon which the reservoir and site are located. According to its allegations he once had possession of the premises, but was ousted therefrom by defendants. The averments to the effect that plaintiff did not own the fee simple title to the premises, but was diligently engaged in trying to find such owner for the purpose of condemning or purchasing the same, sufficiently show the title not to be in the government, but rather in private ownership. If the complaint be tested by sec. 267 quoted, the matters required to be stated therein will be found wanting. Neither the allegations in the complaint, that at the time of ouster by defendants plaintiff had not secured the fee title to the land comprising the reservoir and site, but was diligently engaged both before and after the bringing of suit in an endeavor to find the owners of the fee simple title for the purpose of purchasing same or acquiring the title by condemnation proceedings, nor the allegation that "the estate of plaintiff in said property and premises consists of a lawful filing for a reservoir and reservoir site under the law, with a right either by purchase or by condemnation proceedings to acquire the fee title to said land from the owners, whoever the owners may be or have been," states the nature and extent of any estate in the property in question. Appellant's position seems to be that when his complaint pleads the filing of the statement and map of the reservoir and site with the state engineer he there-

by shows a legal right in him to enter the private premises of another for the purpose of constructing such reservoir. The constitution and laws of the state are both authority for the right to condemn private property as a reservoir site for private use, but a lengthy, complete and detailed proceeding for such condemnation has been enacted by the legislature, which can be found in sec. 2416 and accompanying sections, *Revised Statutes,* 1908. There is not a sentence in the complaint tending to show that plaintiff had attempted to comply with this statute. It affirmatively shows that plaintiff had no estate whatever in the land and no right of possession thereof. Plaintiff having elected to seek redress through this code proceeding, it was incumbent on him to conform his pleadings to its requirements. Having failed to do this, necessarily his action fails. It would appear from the averments of the complaint that probably the statute of forcible entry and detainer could have been successfully invoked and full relief obtained thereby.

It has been held by our supreme court that the common law rule, that in actions of ejectment plaintiff must recover upon the strength of his own title, and not upon the weakness of that of defendant, applies to actions brought under the code sections here considered.—*Chivington v. Colo. Spgs.,* 9 Colo., 597, 14 Pac., 212; *Iron Silver M. Co. v. Campbell,* 17 Colo., 267, 29 Pac., 513. This doctrine, however, is held not to apply where title is in the United States.—*Lebanon M. Co. v. Consolidated R. M. Co.,* 6 Colo., 371. In the case at bar plaintiff pleads no title or facts showing a legal right of possession in and to the land in issue. On the contrary he states he has no title therein. In *Tracy v. The Norwich and Worcester R. Co.,* 39 Conn., 382, being an action in ejectment, the court used this language:

"We, however, ought to say that we regard it as ele-

mentary law in Connecticut that in this action of disseizin or ejectment the plaintiff must recover, if he recover at all, by the strength of his own title. Ample remedies are provided by actions of trespass and by proceedings for forcible entry and detainer for the disturbance of quiet possession, and we see no good reason for any change or mitigation of the familiar rule in respect to proof of title in ejectment."

Chapter 27, entitled "Ejectment," *Revised Statutes,* Colo., 1868, is similar in many respects to chapter 23, *Mills' Annotated Code,* so much so that it is a fair presumption that, when the framers of the code were drafting that instrument, they incorporated therein a substantial part of the former chapter. In *Drake et al. v. Root,* 2 Colo., 685, the action was founded upon this chapter of the *Revised Statutes,* sec. 8 of which reads as follows:

"The plaintiff shall in every case state in his declaration whether he claims in fee, or whether he claims for his own life or the life of another, or for a term of years, specifying such life or the duration of such term," etc.

In construing this section, Judge Hallett, who rendered the opinion of the court, spoke as follows:

"The finding of the jury is a more serious matter, for by the seventh clause of the twentieth section of the act (R. S., 277), it is provided that the verdict shall specify the estate which shall have been established upon the trial by the plaintiff, whether in fee or for life, or a term of years, or a right of possession and occupancy only. By the eighth section, the plaintiff is required to set forth the estate which he hath in the premises; and, by the twenty-third section, the judgment is to be given according to the verdict, while in the twenty-fifth section the judgment is made conclusive as to the title established at the trial. Thus, in the pleadings, as well as in the verdict and judgment, the estate or interest of the plaintiff in

the property is made a matter of substance, which is not upon any account to be overlooked or omitted."

Mash v. Bloom, 133 Wis., 646, 114 N. W., 457, 4 L. R. A. (N. S.), 487, 14 Ann. Cas., 1012, was an action in ejectment founded upon certain sections of a statute almost identical with our code section above quoted. The question there arose on a demurrer as to whether or not the complaint stated facts sufficient to constitute a cause a action. The supreme court held the demurrer to be good, reversing the lower court. The following excerpt is found in the opinion:

"The complaint fails to state the statutory requirements for a complaint in ejectment, and especially in the following particulars, namely: As to the plaintiff's estate or interest in the premises or that plaintiff is entitled to the possession of the premises. It is well settled that the requirements of the statute in complaints in ejectment must be strictly complied with (citing cases). Not only has the plaintiff failed to allege in her complaint the statutory requirements, but she has negatived a right to recover at the time of the commencement of action by showing a conveyance of the property to defendant on condition subsequent, and failure to show in the complaint any action evincing a purpose on her part to reinvest herself of her former estate because of forfeiture on account of condition broken."

So it may be said in the case at bar that plaintiff not only has failed to allege in his complaint the requirements of the code, but he has negatived a right to recover at the time of the commencement of the action by alleging a state of facts showing that he had no right, title or estate in the premises, and no legal right to the possession of the same at the time he claims to have been ousted.

Thompson v. Wolf, 6 Ore., 308, was an action in the nature of ejectment, brought under a code section iden-

tical with our own. The following excerpts are taken from the opinion of the court:

"From the complaint it appears that the respondent's grantor * * * 'leased and let' to the appellant 'as tenant at will or by sufferance' a certain parcel of land in Washington county. Thereafter the land was conveyed to respondent, and * * * he served appellant with notice to quit.

"Two questions arise upon this record. The first is, what is the character of the action? It cannot be regarded as an action of ejectment. In that action it is necessary that the plaintiff set forth the nature of his estate in the property, whether it be in fee, for life or for a term of years, * * * thereby enabling the courts to settle the question of title which is the great end of the action of ejectment with us. The complaint herein is entirely silent as to the nature of the respondent's estate, the recovery of the mere possession of the premises being all that is sought. Therefore, we are of opinion that this must be regarded as an action brought under the forcible entry and detainer act."

We discover no error on behalf of the trial court in sustaining the demurrer to the complaint. Judgment affirmed.

[No. 3669.]

FOSTER v. GRAY.

1. TAX TITLE—*Void Deed.* A treasurer's deed which shows the sale of non-contiguous tracts, for a gross sum; or that the lands were struck off to the county on the first day of the sale; or which fails to show by apt words what lands were sold, is void.

2. QUIETING TITLE—*Answer.* An answer not specifically denying plaintiff's allegation of ownership, but averring the defendant is the

owner and entitled to possession, setting forth the source and nature of his title, puts the plaintiff's title in issue.

3. LIMITATIONS—*Void Deed*, does not set in motion the five years' statute of limitation. (Rev. Stat., Sec. 5733.)

4. —— *Cloud Upon Title.* The five year statute of limitations (Rev. Stat., Sec. 5733) is no plea to a bill to remove a cloud from title.

Appeal from Kiowa District Court. HON. J. E. RIZER, Judge.

MESSRS. CRANE & PATRICK, for appellant.

No appearance for appellee.

HURLBUT, J., delivered the opinion of the court.

Code action to quiet title commenced September 27, 1906, by appellant (plaintiff below) against appellee.

The cross-complaint included in the answer asserts title in defendant to the disputed premises by virtue of a government patent, and further pleads that the title of plaintiff is based upon a tax deed recorded June 6, 1900, in the clerk's office of Kiowa county, but alleges the same to be absolutely void, and a cloud on defendant's title. Replication denies defendant's title and possession; denies that the tax deed mentioned is void on its face or otherwise; and pleads the five years statute of limitations.

Decree was rendered in favor of defendant, quieting title in him, from which this appeal was taken.

At the trial defendant established title in himself by introducing in evidence, without objection, patent from the government of the United States, therein conveying to him the premises in issue.

Plaintiff offered in evidence treasurer's deed for the premises, dated March 7, 1900, filed for record June 6, 1900, the grantee therein being S. R. Smith, from whom plaintiff deraigned title. Defendant objected to the introduction of the deed in evidence, alleging as reasons:

(a) That the deed shows the sale of non-contiguous tracts of land *en masse* for a gross sum; (b) that it shows the county bid off the premises on the first day of sale, and fails to show that the same were offered on the first day of sale and from day to day thereafter until the last day of sale, the last day being the only time the county was authorized to purchase the property; (c) that it does not show what portion of the lands was sold, or that any lands were sold by the treasurer, in that no lands were described or referred to by apt words in the space provided for in the statutory form; and, lastly, (d) the acknowledgment was fatally defective. The court sustained the objection and excluded the deed from evidence. There was no error in this ruling. The tax deed reads, in part, as follows:

"Know all Men by these Presents, That, whereas, the following described real property, viz.: (non-contiguous tracts here described) situated in the County of Kiowa and State of Colorado, was subject to taxation * * * ; and, whereas, the Treasurer of the said County did, on the 22nd day of December, A. D. 1896, by virtue of the authority vested in him by law, at (an adjourned sale) the sale begun and publicly held on the 22nd day of December, A. D. 1896, expose to public sale at the office of the Treasurer in the County aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and costs then due, and remaining unpaid on said property; and, whereas, at the time and place aforesaid Kiowa County, of the County of Kiowa, and State of Colorado, having offered to pay the sum of One Hundred and Twenty-five Dollars and Eighty-five Cents, being the whole amount of taxes, interest and costs then due, and remaining unpaid on said property, for the year 1895, which was the least

quantity bid for, and payment of said sum having been made by Kiowa County to the said Treasurer, the said property was stricken off to Kiowa County at that price;" etc.

Under the first objection to the admission of the deed it will be seen that the deed was void on its face for the reason that it shows a tax sale *en masse* of non-contiguous tracts for a gross sum.—*Page et al. v. Gillett,* 47 Colo., 289, 107 Pac., 290; *Empire R. & C. Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522. The second objection is also well taken. It will also be seen that the deed is void on its face for the reason that it shows the land sold was struck off to the county on the first day of the sale and fails to show it was offered from day to day until the last day of sale as required by statute.—*Bryant v. Miller,* 48 Colo., 692, 109 Pac., 959; *Church v. Nielsen,* 23 Colo. App., 211, 128 Pac., 880; *Empire R. & C. Co. v. Howell,* 23 Colo. App., 348, 129 Pac., 521; *Empire R. & C. Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522; *Empire R. & C. Co. v. Howell,* 23 Colo. App., 265, 129 Pac., 245; *Empire R. & C. Co. v. Gibson,* 23 Colo. App., 345, 129 Pac., 520. The third objection is equally good. The deed is void on its face because it does not appear in the proper place in the deed what lands were sold, either by description or apt words of reference. At the time this property was sold the sale of lands for delinquent taxes was different from a sale under execution, mortgage, trust deed, decree of court, etc., as in the latter cases the highest bidder was one who bid a certain amount for each tract or for all the premises offered, as the case might be, while in the former such bidder was the one who offered to pay the tax due for the smallest portion of the land offered. If the bid was for the whole of the property offered, then the second description of the land required by the statutory form need not have been a verbatim repetition of the former

description, but some phrase such as "all said property," "the whole of the property hereinbefore described," etc., would have satisfied the statute, but if the bid had been for only a portion of the land offered, then it was necessary in the second description that the deed specifically, or by apt words, describe such portion so struck off and sold under the bid.—*Lines v. Digges,* 43 Colo., 166, 95 Pac., 341; *Riley v. Lemieux, ante,* 184, 132 Pac., 699.

No brief is filed by appellee. Appellant contends that there is no denial in the answer of plaintiff's allegations of ownership set out in the complaint. It is true the answer does not deny in terms such allegations, but it contains this recital:

"That the said defendant is the owner and entitled to the possession of the following described real property (describing lands), by virtue of a patent duly made and executed by the United States of America, conveying the same to the said defendant."

While the answer is loosely drawn in this respect, the recital just quoted is inconsistent with an admission of title or ownership in plaintiff, and is sufficient to raise an issue on plaintiff's claim of title.—*Dodge v. Millett et al.,* 23 Colo. App., 64, 127 Pac., 247; *McCroskey v. Mills,* 32 Colo., 272, 75 Pac., 910; *Bessemer Ir. D. Co. v. Woolley,* 32 Colo., 437, 76 Pac., 1053, 105 Am. St., 91.

The five years statute of limitations is not set in motion by a deed void on its face; *Gomer v. Chaffee,* 6 Colo., 314; *Empire R. & C. Co. v. Irwin,* 23 Colo. App., 206, 128 Pac., 867; and the plea is not available in an action to quiet title where the sole purpose of the action is to remove cloud on plaintiff's title; *Munson v. Marks,* 52 Colo., 553, 124 Pac., 187; *Empire R. & C. Co. v. Mason,* 22 Colo. App., 612, 126 Pac., 1129.

There are other errors discussed by appellant which need not be noticed, as those already disposed of show the tax deed to be void on its face and incompetent to fix any title to the disputed premises in plaintiff. Defendant showed fee title to the disputed land in himself, and was entitled to a decree quieting his title.

The record appearing to be free from error, the judgment will be affirmed.

[No. 3673.]

GIBSON v. FOSTER.

1. TIME—*Computation.* Fractions of a day are not regarded in computing the time during which process must be in the hands of the sheriff, in order to warrant publication. (Mills' Code, Sec. 382; Rev. Code, Sec. 416.) The first day is excluded and the last included. Service of summons by publication. The summons was issued May 1st and returned May 11th, not found. *Held* sufficient to warrant publication.

2. TRIAL—*Stipulation of Counsel—Mistake.* Stipulations of counsel as to the facts of the cause will not be vacated upon any lower grounds than would warrant the rescission of a contract, *e. g.*, fraud, collusion, surprise, mistake, or the like.

And application should be seasonably made in the trial court. Plaintiff in ejectment stipulated that one Z, from whom he derived title, was defendant in a certain cause named, and that in said action before Z's conveyance a decree was entered quieting the title in defendant. The record produced showed that in fact Z was not a party to that action. No suggestion of a mistake was made in the court below, nor was error directly assigned thereon. *Held* that plaintiff was concluded by the stipulation.

Appeal from Kiowa District Court. HON. J. E. RIZER, Judge.

Mr. JOHN F. MAIL, for appellant.

Messrs. CRANE & PATRICK, for appellee.

MORGAN, J.

This is an appeal by plaintiff from a judgment for defendant in an action for the possession of a quarter-section of land. At the beginning of the trial in the lower court it was stipulated: That the United States conveyed the land to Samuel Menz, September 8, 1888; that he conveyed to Clint C. Rush, March 11, 1892; that he conveyed to Charles Zilly, March 18, 1895; that he conveyed to Albert E. King, October 4, 1907; that he conveyed to Charles E. Gibson, the plaintiff; that Charles Zilly was a defendant in a certain case, No. 135, in Kiowa county, entitled Foster v. Deleplane et al., and that judgment was rendered in that action quieting the title of George S. Foster, September 7, 1906, prior to the time that Zilly conveyed to King.

After this stipulation was made, the plaintiff rested, and defendant offered in evidence, without objection, the complaint and the decree in the said case No. 135, both of which show on the face thereof that the name of Charles Zilly does not appear therein.

The plaintiff then offered in rebuttal the summons, the affidavit of publication, and the order of publication, in said case No. 135, all of which show that Charles Zilly's name does not appear; and said evidence discloses, also, that the summons was issued on May 1, and returned by the sheriff, not served, on May 11, 1906.

Appellant assigns for error that the court erred in rendering judgment for the defendant, and not for the plaintiff; that the court erred in holding that any jurisdiction of the person of the defendant was acquired by the plaintiff in said case No. 135, and that the court erred in holding that the summons in said case was held by the sheriff for the time required by law.

It has been repeatedly held, as shown by the exhaustive discussion in the case of *Stebbins v. Anthony,* 5 Colo., 348, and it is also provided in our code, sec. 382, that frac-

tions of days are not noticed in computing time in such instances as this, and that time, in such instances, is computed by excluding the first day and including the last. Consequently, the sheriff held the summons for a sufficient length of time. The law does not require that ten full days intervene between the first day, the day the summons is issued, and the day that it is returned.

No contention seems directly based upon the disclosure by the decree and the judgment roll, including the publication of summons, that neither Zilly, who owned the land when the prior suit was begun, nor King, plaintiff's immediate grantor, were parties thereto. No error is directly assigned thereupon, and the lower court's attention was not directed to this apparent mistake in the stipulation. Under these circumstances, the appellant is bound by his stipulation.

Thompson, in his work on Trials, vol. 1, sec. 194, says:

"Such being the nature of the stipulations of counsel made in court touching the cause of the trial, it follows that they will not be set aside upon any lower grounds than those which would warrant the rescission of a contract—namely, fraud, collusion, accident, surprise, or some ground of the same nature. The court will not relieve parties from the effects of a stipulation made under a full understanding of the facts existing at the time. The mere fact that a party, by such a stipulation, has *waived defenses* which he might otherwise urge, is no sufficient ground for setting it aside. But, by analogy to the relief of parties from contracts entered into under a *mutual mistake of fact,* it is clear that a court will relieve a party against a stipulation made under such a mistake."

Judge Thompson cites *Butler v. Chamberlain,* 66 Neb., 174, 92 N. W., 154: "This principle does not, how-

ever, embrace a case of omission of those things which reasonable prudence should have included and provided against." And *Conner v. Belden,* 8 Daly (N. Y.), 257, to the effect that parties cannot be relieved from the effects of a stipulation made under a full understanding of the facts existing at the time, "unless it has been improvidently entered into, and stands in the way of substantial justice, when a wise discretion should relieve from its effects," and *Wells v. American Express Co.,* 49 Wis., 224, 5 N. W., 333, wherein the mistake does not appear to have been mutual, and yet the stipulation was set aside.

In the light of these authorities, the lower court, within its discretion, might have relieved the plaintiff from the effect of this stipulation if it had been so requested, and upon a proper showing that both parties to the stipulation were mistaken as to the facts, but no such request was made of the lower court, nor of this court. Appellant contents himself, solely, upon what the record discloses, and, while frequently repeating in the abstract and in his brief, that Zilly was *not* a defendant, he never refers to the stipulation, which admits that Zilly was a defendant, and that the decree was rendered against him. Counsel seems to be disposed to adhere strictly to the stipulation, and there may be reasons for it not appearing in the record.

In view of the premises and the absence of anything except that Zilly's name does not appear in the decree or in the roll, and on account of our inclination to respect and encourage stipulations as to facts and require a strict adherence thereto in the trial of cases where the proof would consist of the formal introduction of lengthy documentary evidence with which counsel can thoroughly familiarize themselves prior to the trial, the judgment will be affirmed. *Affirmed.*

[No. 3674.]

KING v. FOSTER.

The case ruled by the judgment in *Gibson v. Foster, ante.*

Appeal from Kiowa District Court. HON. J. E. RIZER, Judge.

Mr. JOHN F. MAIL, for appellant.

MESSRS. CRANE & PATRICK, for appellee.

MORGAN, J.

Appeal from a judgment against the plaintiff in the Kiowa district court in his action for possession of a quarter-section of land. Defendant pleaded a decree of said court, duly made against plaintiff's immediate grantor, prior to his purchase. The enrolled record of the decree pleaded discloses that the sheriff's return was made "not found" on May 11, on the summons which was issued May 1, 1906, service by publication. The assignments of error are upon the contention that the return was made too soon. This contention has been disposed of against the appellant in the case of *Gibson v. Foster,* No. 3673, just decided by this court, controlling this appeal.

Judgment affirmed.

[No. 3810.]

BROWN v. WELLINGTON MINES CO. ET AL.

1. APPEAL—*Transcript—Affidavits,* filed in the court of review are not to be accepted as testimony.

2. —— *Bonds—Not Approved.* An appeal bond, though filed with the clerk, is without effect unless approved by him, where the order

allowing the appeal so directs. No jurisdiction vests in the appellate court.

3. —— *Bill of Exceptions—Not Filed in the District Court*, and not in any way authenticated will not be considered.

Appeal from Summit District Court. HON. CHARLES CAVENDER, Judge.

Mr. THOMAS A. BROWN, *pro se.*

Mr. JAMES T. HOGAN, Mr. QUENTIN D. BONNER, for appellees.

CUNNINGHAM, Presiding Judge.

Appellant Brown, as plaintiff below, filed his complaint in the district court in support of an adverse proceeding against the appellees. When the case was called, after a considerable parley in which the court, the plaintiff and the attorney for the defendant took part, plaintiff moved orally that the case be nonsuited. No attempt was made by Brown to withdraw his motion for a nonsuit, which, before the taking of any testimony, was granted, or, at least, the trial judge entered the nonsuit, to which plaintiff saved an exception. Assuming that under this state of the record the plaintiff has a right to prosecute this appeal, still we may not consider it because of the fatally defective condition of the record. So far as we are able to discover, every rule of this court and every provision of the code pertaining to appellate procedure which are in any manner applicable to these proceedings have been utterly ignored by appellant, who appears here, as he appeared in the district court, in his own behalf and without other counsel.

Much of the record in this court is made up of affidavits which appellant has filed directly in this court, and which he asks us to treat as testimony regularly offered on the trial. This, of course, we cannot do. Moreover,

it appears clearly from the record that the plaintiff was attempting, in the court below, to relitigate questions that were finally determined against him, as between himself and The Wellington Mines Company, in a former action, in which former trial the plaintiff was represented by able lawyers. See *Brown v. Colorado-Wyoming Development Co.*, 47 Colo., 294, 107 Pac., 258. It may be true that there is additional territory included in the mining claim here involved, but the mining claim involved in the former suit, which was determined adversely to the plaintiff, included the discovery shaft on which the plaintiff must depend in this case for his title.

The record also discloses that the appeal bond in this case has never been approved by the clerk or the presiding judge. The order of the trial court allowing the bond requires that it be approved by the clerk. The appellant seeks to excuse this defect in his bond upon the theory, apparently, that no other duty rested upon him than to prepare and file the bond with the clerk; that it then became the duty of the clerk to approve the same. This contention cannot be allowed. It is the duty of one who seeks to perfect an appeal from the judgment of a *nisi prius* court to see to it that his appeal bond is approved and he cannot excuse his neglect in this behalf by pleading the carelessness or oversight of the clerk of the trial court. Without an appeal bond, duly approved, no jurisdiction vests in this court to review the proceedings of the lower court.—*State Bank v. Plummer*, 46 Colo., 71, 102 Pac., 1082.

There is nothing to indicate that the so-called bill of exceptions, which has been filed in this court, was ever filed in the district court or attested by the seal of said court or otherwise authenticated by the clerk or any other officer connected with that court, hence it cannot be considered by us for any purpose.

There are other fatal defects in the record, to which it is not necessary to direct attention.

For the reasons assigned, the appeal must be dismissed and the judgment of the trial court affirmed.

Judgment affirmed.

[No. 3886.]

SCHILDT v. THE CIMARRON & UNCOMPAHGRE VALLEY CANAL AND RESERVOIR COMPANY.

The evidence being insufficient to support a judgment for plaintiff, who was the plaintiff in error, the judgment of the district court on a directed verdict affirmed.

Error to Montrose District Court. HON. SPRIGG SHACKELFORD, Judge.

Mr. HUGO SELIG, for plaintiff in error.

MESSRS. BELL, CATLIN & BLAKE, Mr. PHILIP W. MOTHERSILL, for defendant in error.

Per Curiam.

Plaintiff in error brought his action in the district court to recover for damages alleged to have been occasioned to his land by water escaping through breaks in the ditch or canal of the defendant corporation. At the conclusion of his evidence, counsel for the ditch company moved the court for a directed verdict, on the grounds (a) that the complaint did not state facts sufficient to constitute a cause of action; (b) the insufficiency of the evidence to sustain a verdict for plaintiff. The motion was granted and a verdict returned, under the direction of the court, in favor of defendant. The abstract does not disclose clearly whether the trial judge acted on the de-

murrer to the complaint, or to the evidence, or both. At the opening of the trial, with much reluctance, the trial judge overruled defendant's demurrer to the complaint. Whether the complaint states a cause of action or not is, in our judgment, a close question, but a careful reading of the testimony convinces us that it is insufficient to support a judgment in favor of plaintiff. We think no good purpose can be served by our analyzing and pointing out the deficiencies in the evidence. No question of great public interest is involved, and, as we view it, the record presents no nice questions of law calling for a written opinion in this case. We think it is sufficient for all purposes to say that in the main we agree with the position taken by counsel for defendant in error in their brief on file in this case.

Judgment affirmed.

BELL, Judge, not participating.

[No. 3584.]

SCOTT v. LAMBERT ET AL.

DEED OF TRUST—*Recitals of Trustee's Deed*, are, where the deed of trust so provides, *prima facie* evidence of the facts recited, e. g., the deed being executed by a substitute trustee, the recitations thereof that one W. was at a date named the holder of the promissory note mentioned in the deed of trust, that the original trustee was a nonresident of the state, and therefore unable to act, and that W. had appointed as substitute trustee the grantor in the deed, were held *prima facie* evidence of the facts so recited.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellees.

BELL, J.

This suit was brought in Yuma county, Colorado, under sec. 255 of Mills' Ann. Code, to quiet the title of the plaintiff to the N. E. ¼ of sec. 23, tp. 4, S. R. 45 W. 6th principal meridian. The defendant, W. T. Lambert, filed a disclaimer and the suit was dismissed as to him. The appellee, James Q. Conrad, denied the allegations in the complaint, set up a fee simple title in himself, then set up the same title in a cross-complaint and asked that the title to the property be quieted in him. The cause was tried before the district court without a jury, resulting in the dismissal of the plaintiff's cause of action and quieting the title in the appellee, from which judgment the plaintiff appealed. The assignments of error especially urged are: Assignment No. 2, that the court erred in admitting in evidence defendant's exhibit 3, a trustee's deed, the result of a foreclosure of a trust deed executed by James Knapp to Harrington Emerson as trustee to secure the payment of a promissory note for $150.00 made by James Knapp and payable to the Reliance Trust Company, because, appellant says, it does not appear in the evidence that the holder of the note mentioned in exhibit 1 (trust deed) ever assigned or sold said note to anyone who requested the foreclosure or appointed a substitute trustee to foreclose said trust deed, and the appellant is not bound by the *ex parte* affidavit attached to the trustee's deed, exhibit 3, or the recitals therein; assignment No. 3, that the court erred in admitting in evidence exhibit 1 (trust deed) because it had not been properly foreclosed. The material complaint in assignment No. 4 is based on the failure of the appellee to show that B. M. Webster was the legal holder of said note when he attempted to appoint a substitute trustee and directed the foreclosure of the trust deed.

The appellee introduced in evidence exhibit 1, the trust deed, which provides that:

"It is agreed that the recitals in said (trustee's) deed shall be taken and accepted as *prima facie* evidence of the facts therein stated."

The trust deed further provides:

"That in case of death, inability or refusal to act, of the said party of the second part (trustee) * * * then the legal holder * * * of said note shall have the option of substituting any other person in his stead by writing duly acknowledged."

B. M. Webster, who is recited in the trustee's deed as the legal holder of the note, by a writing (exhibit 2) duly executed, acknowledged, delivered and recorded, appointed W. T. Lambert as substitute trustee after Harrington Emerson had, for a long time, absented himself from the state. The trustee, W. T. Lambert, made sale of the premises, and executed and delivered the trustee's deed, which was admitted in evidence and recites, in part, as follows:

"Harrington Emerson is now, * * * a non-resident of the state of Colorado and therefore unable to act (as trustee) and B. M. Webster, the legal holder of said note, has appointed the undersigned (W. T. Lambert) substitute trustee instead of the said Harrington Emerson; * * * default hath been made in the payment of the said note, * * * and the legal holder of said note has requested the sale of said premises * * * ."

We infer from the assignment of errors and argument of counsel for appellant that the pith of his contention is that there is no evidence establishing the assignment or ownership of the note, secured by the trust deed, in B. M. Webster at the time he endeavored to appoint W. T. Lambert as substitute trustee, and no evidence establishing ownership or possession of the note by B. M. Webster when he requested the foreclosure. The appellee relied, at the trial, upon the agreement in the trust

deed that the recitals in the trustee's deed should be taken and accepted as *prima facie* evidence of the facts therein stated, and relied upon those recitals to prove that the original trustee had left the state and had been away for a long period of time; that B. M. Webster was the legal holder of the note, and had appointed W. T. Lambert as substitute trustee and requested him to foreclose the trust deed, and that the substituted trustee, W. T. Lambert, had regularly complied with the request.

Whenever it is stipulated in the trust deed, as it is in this case, that the recitals in the trustee's deed shall be *prima facie* evidence of the facts therein stated, it is very generally held that the trustee's deed is admissible in evidence without extraneous proof of any matters which are recited in the trustee's deed as existing facts.—*Empire Co. v. Gibson,* 22 Colo. App., 617-619, 126 Pac., 1103; *Webster v. Kautz,* 22 Colo. App., 111-117, 123 Pac., 139; *Bent Otero Improvement Co. v. Whitehead,* 25 Colo., 354-359, 54 Pac., 1023, 71 Am. St., 140; *Jesson et al. v. Texas Land & Loan Co.,* 3 Tex. Civ. App., 25, 21 S. W., 624-626; *Carey v. Brown,* 62 Cal., 373-375; *Beal v. Blair,* 33 Ia., 318-323; *Ingle v. Jones et al.,* 43 Ia., 286-293, 5 N. W., 353; *Savings and Loan Society v. Deering,* 66 Cal., 281-286, 5 Pac., 353; *Tartt v. Clayton,* 109 Ill., 585; Jones on Mortgages, vol. 2, 6th ed., sec. 1895.

It has further been held by this and a former court of appeals that:

"Even where the deed of trust does not provide that the recitals in the trustee's deed shall be *prima facie* evidence of the facts therein stated, it is held that such recitals are *prima facie* proof of the matters stated in them."

Empire Co. v. Stratton, 22 Colo. App., 577-581, 126 Pac., 1094; *Empire Co. v. Howell,* 22 Colo. App., 389-391, 125 Pac., 592; *Ensley v. Page,* 13 Colo. App., 452-454, 59

Pac., 225; *Carico v. Kling,* 11 Colo. App., 349-351, 53 Pac., 390.

Considering, as we do, the recitals in the trustee's deed as competent evidence of the facts therein stated, disposes of all the assignments of error which are deemed controlling in the record; hence, the judgment of the district court is hereby affirmed.

[No. 3681.]

KENT ET AL. v. COBB.

1. PARTNERSHIP—*Definition.* A partnership is a contract expressed or implied, between two or more competent persons, to place their effects, labor and skill, or some of these, in business, and divide the profits and bear the losses, in certain proportions. There must be a unity of interest in the prosecution of the business; and whether or not a partnership exists depends on the intention of the parties.

2. —— *Burden of Proof.* The burden of establishing a partnership is upon the one who asserts it.

3. —— *Between Husband and Wife—Evidence.* Much more evidence is required to establish a partnership between husband and wife than between persons not sustaining that relation. That the wife assists the husband, e. g., by keeping the books, and making out and receipting the bills, and that, in speaking of the business, she uses the plural pronoun, "we," is not alone sufficient to establish a partnership against the explicit denials of both husband and wife.

4. EVIDENCE—*Opinions.* The question being asked as to the existence of a partnership between the defendants, it is error to permit the plaintiff to state that the defendants were partners. Such a statement is merely the conclusion of the witness.

5. —— *Conversation by Telephone.* A party to the action may testify to a conversation with his adversary, by telephone, relating to the matter in issue; and, as showing acquaintance with his voice, he may testify to previous like conversations had with such adversary.

A bystander may testify to the conversation so far as he heard it.

6. INSTRUCTIONS—*Exceptions to.* Error in an instruction, to which no exception was saved, is without influence upon an appeal.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. CHARLES R. BOSWORTH, for appellants.

Mr. MARTIN HERBERT KENNEDY, for appellee.

KING, J., delivered the opinion of the court.

Clarence Cobb, as plaintiff, brought his suit against the appellants herein, as defendants, to recover damages in the sum of $1,200, of which $500 were claimed as exemplary damages. The complaint alleged that at all times mentioned the defendants were conducting an automobile business in Denver under the firm name of The Kent Automobile Company, a co-partnership; that about April 16th, 1908, for a commission of 10 per cent of the selling price, plaintiff employed defendants to sell his automobile, valued at $1,700, and that on said date he delivered the automobile to the defendants for such purpose; that defendants agreed that the automobile would not be used or operated except by the said E. R. Kent, and then only for the purpose of demonstrating the same to contemplated purchasers, but that immediately after receiving the same the defendants, without the knowledge or consent of plaintiff, placed the automobile in the rent service, and in charge of incompetent and unskillful chauffeurs, and that it was used in such a reckless and unskillful manner that it was damaged while in the possession of defendants in the sum of $600; that plaintiff spent $100 in repairing the same. Defendant, Carrie A. Kent, filed a general denial. Defendant, E. R. Kent, pleaded a general denial, and also a separate defense and cross-complaint, alleging that the automobile was left with him for repairs, which were made, of the value of $25.07, no part of which had been paid, and prayed judgment in the said sum. Trial was had to a jury and a verdict of $500 for plaintiff

returned, upon which judgment was entered and from which this appeal was taken.

The liability of the defendant, Carrie A. Kent, depends wholly upon the question of partnership. If it be said the complaint might have been so construed as to charge the defendants jointly, or jointly and severally, irrespective of the allegations of co-partnership, nevertheless the cause was not so tried. The court, without objection by plaintiff, instructed the jury that the suit was against the defendants as co-partners, and that unless a co-partnership was established by the evidence, the verdict must be for the defendants.

Defendants were husband and wife. At and prior to the events giving rise to the suit the husband was the owner of certain real estate at 1743 Logan street, in Denver. The lower part of the building thereon was used as a garage, and the upper portion as apartments, in which the defendants, with their children, resided. The husband was also the owner of the machinery and equipment with which the automobile business was carried on. No part of the property, either personal or real, stood in the name of, or belonged to, the wife, so far as disclosed by the evidence. The front of the garage bore the sign, "The Kent Automobile Co." The evidence upon the part of the plaintiff tended to show that on April 16th, 1908, he delivered his automobile to E. R. Kent, between whom and plaintiff it was understood and agreed that the automobile should be received and kept at said garage for sale at a commission of 10 per cent upon the selling price; that Kent said he would give the car his personal attention and not allow anybody, excepting himself, to take it out of the shop, and then only to make personal demonstration to prospective purchasers; that under these conditions the car was delivered by plaintiff in good condition; that he heard nothing from defendants until election day,

May 19th, 1908, when he saw that his car was being used in taking voters to and from the polls, and driven by a man not the defendant; that about four o'clock that afternoon he went to the garage and saw Mrs. Kent, and the car also, standing near the curbing in front of the garage. He asked her what the car was doing there and she said she didn't know. He then attempted to run it into the garage, but, on account of its damaged condition, was unable to get it in without great difficulty. He then took the car away, and, on February 26th, 1909, filed his complaint in this suit. It is unnecessary to dwell upon the conflicting testimony as to the condition of the car when received and when taken away, as the errors based thereon need not be determined. The further testimony of the plaintiff introduced for the purpose of tending to show that Carrie A. Kent was a partner of her co-defendant was, in substance, that he dealt with The Kent Auto Company; that Mr. Kent had charge of the place and he always dealt with Mr. Kent when he was there, but had some dealings with Mrs. Kent; that she had charge of the books, answered questions relative thereto, made out his bill for repairs and gasoline, and receipted the same, and, in speaking of the business, she used the plural pronoun "we" upon one occasion, namely, when making out and receipting a bill of July 14th, 1908, at which time she said to her husband: "I thought we would not charge him for the gasoline." In reply to this Mr. Kent said: "I guess we will." In addition to this testimony of plaintiff, he was permitted, over the objection of defendants, to state that the defendants were co-partners; that Mrs. Kent "assumed responsibility in Mr. Kent's absence, so far as my experience went," and that she "acted as manager of the business." Motions to strike these conclusions of the witness were overruled. Mr. and Mrs. Kent were called by plaintiff, and interrogated as his own witnesses, but

not as upon cross-examination under the statute. Mr. Kent testified positively that he was the sole owner of the business; that his wife and children lived with him in apartments over the garage, and that his wife sometimes helped with the books and remained at the garage when he was away; that she did not conduct sales; that the proceeds of the business were not divided between him and his wife, and no such arrangement existed; that the only use she got from the proceeds was the support he furnished her as his wife; that he did not pay her a salary, although he sometimes paid her for work done; that such work as she did on the books, or in making out the bills and receipting the same, was done under his control, and upon his authority. Mrs. Kent, as plaintiff's witness, testified, in substance, the same as her husband, but stated that some weeks after the automobile was taken away, the real estate was conveyed to her by her husband, and thereafter he rented the same, and paid the rental to her monthly.

1. A partnership is a contract, express or implied, between two or more competent persons, to place their money, effects, labor and skill, or some or all of them, in business, and to divide the profits and bear the losses in certain proportions. To constitute a partnership *inter se* there must be a unity of interest and for the prosecution of the business in which the supposed partner is charged. —*Omaha & Grant S. & R. Co. v. Rucker,* 6 Colo. App., 334, 40 Pac., 853; *Phillips v. Phillips,* 49 Ill., 437; Parsons on Partnership, sec. 6. And whether or not a partnership existed depends upon the real intention of the parties.— Lindley on Partnership, 6th ed., pp. 10-11; *Salter v. Ham et al.,* 31 N. Y., 321; *Omaha & Grant S. & R. Co. v. Rucker, supra; Garrett v. Republican Co.,* 61 Neb., 541, 85 N. W., 537; *Randall v. Ditch,* 123 Ia., 582, 99 N. W., 190. Evidence of the acts of the wife in and about the business of

the husband was competent as tending to show that she was a partner. But much more evidence is necessary to establish the existence of a business partnership between husband and wife, when denied by them, than between persons not sustaining that relation. The acts of the wife in assisting or advising her husband in the business, such as keeping the books, making out bills and receipting the same, and her use of the personal pronoun "we" in speaking of the business, and such other acts as have been hereinbefore recited, are not in themselves sufficient to establish her actual partnership interest against her explicit denial, as well as that of her alleged co-partner, as all these matters might be satisfactorily explained by her wifely sympathy, and the fact that her own well-being and that of her children would be affected by the business success or failure of her husband. And we think that all such testimony as is here given will not, alone, raise any presumption that the wife was entitled to any share of the product of the business as a co-partner therein. It is so held in *John Bird Co. v. Hurley,* 87 Me., 579, 33 Atl., 164, a well-considered case in which the court, by Mr. Justice Emery, said: "The law cherishes the marriage relation. It recognizes the deep interest the wife should, and does, take in the business carried on by the head of the family. It regards and commends this interest as arising naturally from marital affection and duty rather than from any partnership in the business. This wifely interest is essential to the completeness of the marriage relation. Its quick and ample manifestation should not be restrained by any fear of danger therefrom to the wife or her separate estate." In this case the evidence of plaintiff offered for the purpose of tending to show partnership falls far short of proof that the wife was a partner against explicit denials made by her and her husband. There is present no element of partnership by estoppel.

2. The action of the court in permitting plaintiff to testify that defendants were co-partners, and that defendant, Carrie A. Kent, assumed responsibility over, and acted as manager of, the business, was error, and we think prejudicial. Those were ultimate facts for determination by the jury under appropriate instructions from the court, and as to the defendant, Carrie A. Kent, at least, the question of partnership was the pivotal question in the case. The statement of plaintiff that defendants were co-partners was merely his conclusion. Witnesses are only competent to state facts. The objections to these questions should have been sustained and the answers stricken out, and refusal so to do was error.—*Omaha & Grant S. & R. Co. v. Rucker, supra; Dwinel v. Stone,* 30 Me., 384.

3. The only direct evidence of the use of the car by the defendants, or either of them, was the use made of it on election day. Whether that use was with or without the knowledge or consent of the plaintiff was an issue made by the pleadings. It was material, and possibly decisive of the liability of the defendant, E. R. Kent. The court instructed the jury that if the car was used on that day with the consent of plaintiff, then defendants would not be liable. Defendant, E. R. Kent, testified that, preceding the use of the car on election day he had a telephone conversation with the plaintiff, whom he knew, and whose voice he recognized, and that he asked and received permission from plaintiff to rent the car on that day, and acted upon such permission in so renting it. He also attempted to testify that he had had numerous conversations with the plaintiff, for the purpose of showing that he was acquainted with plaintiff's voice, but was not permitted so to testify. He was also refused permission to testify as to who were present during said telephone conversation. He offered two witnesses to prove that they were present in his office at the time and heard the tele-

phone conversation, and what it was, but such testimony was not permitted. We think this was error. As we have said, this was a crucial question. Defendant had testified to the conversation, and that plaintiff's consent to run the automobile had been then obtained, and this conversation the plaintiff denied. It was important that defendant should be able to corroborate his own statement as to such conversation, and the testimony offered and which was refused might, if received, have been decisive of that question. There seems to be no doubt of the admissibility of such testimony, either upon reason or authority. A telephone conversation between the parties, and upon the subject-matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander, so far as he heard it.—12 Enc. of Ev., 478; *Miles v. Andrews,* 153 Ill., 262, 38 N. E., 644; *McCarthy v. Peach,* 186 Mass., 67, 70 N. E., 1029, 1 An. Cas., 801; *Snively v. Colburn,* 78 Ill. App., 93.

We think the two instructions on the question of partnership were erroneous: The one numbered 2, because it did not correctly state the law applicable to the facts of this case considering the relation of the defendants as husband and wife; and the one numbered 10, in placing the burden of proving that no co-partnership existed upon the defendants, instead of placing the burden of proving its existence upon the plaintiff. But, as proper exceptions were not reserved, these errors have no influence in determining this appeal. Numerous other errors are assigned, and we think some of the objections therein well taken, but they need not be mentioned. For the reasons stated the judgment will be reversed and the cause remanded.

Reversed and remanded.

[No. 3678.]

GURNETT V. HENRY.

1. EVIDENCE—*Possession of Lands—Presumption.* Proof of title raises a presumption of possession.

2. APPEAL—*Harmless Error.* Bill to quiet title, plaintiff averring possession. This averment was denied, and no evidence upon the question was given by either party. But defendant showed no title. *Held* that having no right, judgment for the plaintiff was not to his prejudice.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. AUGUST MUNTZING, Mr. EGBERT MORE, for appellant.

Mr. CHALKLEY A. WILSON, Mr. ASHER B. WILSON, for appellee.

Per Curiam.

Code action to quiet title. Appellee, plaintiff below, deraigned her title to the land in question from the government. Appellant's title depended entirely upon a tax deed which was void on its face, for the reason that it was based upon a tax sale certificate originally issued to the county and assigned by the county to appellant's grantor, more than three years after its date. This fatal defect appearing upon the face of the tax deed, the trial court properly excluded said deed and rendered judgment for appellee.

Appellee, in her complaint, alleged that she was in actual possession of the land. Appellant denied this averment, and alleged, both in his answer and in his cross-complaint, that the land was vacant and unoccupied. On the trial, no proof whatever was offered by either party touching possession. On this state of the record appellant insists that because of this failure of proof the judg-

ment must be reversed. This contention is without merit. If the land was occupied by plaintiff (and, in the absence of any evidence to the contrary, her proof of title raises a presumption of possession) the judgment is right; if it was vacant, as appellant alleged, the judgment cannot prejudice him, for, by his own proof, he disclosed affirmatively that he was without title.

Judgment affirmed.

[No. 3706.]

TRAVER v. DODD ET AL.

1. NOTICE—*Possession of Land.* The mere "charge" of land, not accompanied by actual occupancy, or any act of ownership, is not notice of any right in the one so in charge.

2. INJUNCTION—*To Restrain a Trespass Upon Lands*, allowed.

3. LANDLORD AND TENANT—*Right of Action for a Trespass to the Tenement.* Damages to growing crops belong to the tenant, and are not recoverable by the landlord.

4. DAMAGES—*Evidence as to.* An action for injury to lands by trampling the same with cattle, exterminating the alfalfa with which the land was seeded. A witness estimated the permanent damage at $10 per acre, because he could have gotten $10 per acre for it, if seeded down. There was no evidence of the rental value of the land, if unseeded, in the year of the trespass, nor that, unseeded, it had no value. The evidence was held insufficient to sustain an award of $10 per acre.

The evidence as to an award of damages, occasioned by the necessity to "re-seed" the land, *held* too indefinite to support the award made.

5. —— *Mitigation of Damages.* In an action for trespass to lands, and resulting injury to the growing crops, the defendant is entitled to show negligence of the tenant contributing to the injury.

Appeal from Montrose District Court. HON. SPRIGG SHACKLEFORD, Judge.

Mr. MILLARD FAIRLAMB, for appellant.

Messrs. CATLIN & BLAKE, for appellees.

CUNNINGHAM, Presiding Judge.

Appellees, plaintiffs below, were the owners of one hundred sixty acres of land which they had purchased in 1906 from one Finch. Finch had owned the land but a few months, having purchased it from one Davis. At no time were there any buildings or improvements of that character upon the land. Plaintiffs leased the land in March, 1909, to A. W. Dillon, who took possession of it and began preparing a portion of it for seeding to alfalfa. Appellant, defendant below, interfered with Dillon's possession of the land by turning his stock upon a forty-acre tract that was in alfalfa. Dillon attempted to keep defendant's stock off of the land by locking gates, but the latter tore down the fences, opened the gates, and successfully persisted in ranging his cattle upon the land. Thereupon, the owners of the land, appellees here, brought suit in the district court to enjoin defendant's use of the land, and for damages. The defendant, in his answer, admitted the facts hereinabove stated, but justified his conduct by claiming and alleging that he was a tenant from year to year of John W. Davis, the first owner named, at the time the said Davis sold the land to Finch; that at the time Finch, the second owner, purchased the property from Davis, he had a talk with Finch, resulting in the renewal, substantially, of the leasing arrangement which he, the defendant, had with the said Davis. That he, the defendant, had never received any notice from the present owners, appellees here, to quit the premises, and that he had continued to perform the obligations of his original lease with Davis and Finch. A temporary injunction was issued against the defendant, which, on the final trial, was made permanent, and dam-

ages were awarded plaintiffs against the defendant in the sum of $570. From this judgment defendant appeals.

1. We are clearly of opinion that the trial court committed no error in that portion of its decree enjoining and restraining the defendant from in any wise trespassing upon the lands of the plaintiffs. The testimony of the defendant himself showed clearly that he was without right as against the plaintiffs to possession of the land. The date and character of his lease from Davis, if he had one, nowhere appear in the record. On this point the defendant contented himself with simply stating:

"I have been in possession of this land about eight years, seven or eight years. * * * I first rented this place from the Davis brothers. It was owned by them. This land was in my possession under a lease from the Davis brothers when it was purchased by Larry Finch, about the first day of April, 1906."

His leasing arrangement with Finch was, according to the testimony of defendant, an oral one, consisting of a conversation between himself and Finch, which he says occurred about the time Finch purchased the land, and which he details as follows:

"Larry Finch drove up there and wanted me to show him the lines of his property, and we drove up on the hill and I showed him as near as I could where the line ran. * * * And he says: 'I want you to go on there and help me, and speak a good word if anybody comes here to look at it, and help me sell it, and stay right along.'"

The defendant was then asked by his counsel: "Q. What were you to do with the property?" and he answered:

"Well, I was to go right along the same as I had, clean out the ditches and take care of the alfalfa, furnish

the water, and do just as I have done. I was not to give him any rental, I was only to perform these services."

Granting, but not deciding, that this conversation was sufficient to constitute a good and valid lease as between Finch and Traver, it could in no manner bind the plaintiffs here, who purchased the land in about ninety days after this conversation between Traver and Finch, and apparently without any notice whatever of defendant's rights, if any he had, or his claim of right to possession. Defendant testified that he had never had any talk with Dodd and Jansick, the plaintiffs in this case, who had been the owners of the premises for three years prior to the filing of the complaint in this cause, in regard to this property; in fact, he could not remember that he had ever seen either of them. Defendant was asked by his counsel:

"Were you in the occupation of these premises at the time the sale took place to Dodd and Jansick?"

and he answered:

"I had the place in charge right straight along up to the time this court ruled that I must get off."

The nature, however, and character of his "charge" of the land does not appear to have been such as would give notice to Dodd and Jansick that he claimed the right to occupy the same.

2. An examination of the record convinces us that the trial court committed reversible error in the determination of the question of plaintiffs' damages. The court allowed the plaintiffs damages in the sum of $570. From its oral findings made at the close of the evidence, this sum appears to have been made up of damage done to the growing alfalfa upon forty acres of land, which the court fixed at $10 per acre; $80 for extra seed that the court found the plaintiffs were obliged, by reason of the

trampling of the land by defendant's stock, to purchase seed for re-seeding the alfalfa land; and the rental value of the land for three years, which included the year 1909, the year for which the plaintiffs had leased the land to the said Dillon. It is apparent that a portion of these damages, if rightfully assessed, would belong, not to the plaintiffs, but to Dillon, their tenant, to whom they had leased the land for the year 1909 at $50 per year, the said Dillon being required, in addition to the $50 per year, to do certain work upon the land as a consideration for its use. There is nothing in the record to indicate that Dillon had assigned his claim for damages to the plaintiffs. The $400 item allowed for damages to the land is supported by the testimony of Dillon alone, and his testimony on this point was brief, incomplete, and we think wholly insufficient to establish the item of $400 damages. Dillon was asked this question:

"Q. What, from your knowledge of the condition of the alfalfa field prior to the time it was tramped by defendant's stock, and after it was tramped by defendant's stock prior to August, 1911, what would you say was the permanent damage to the alfalfa, if any?"

"A. About $10 per acre."

This was all the testimony he gave on this point on direct examination. Immediately, upon cross-examination, Dillon was asked this question:

"What is your full meaning then in regard to the fact that you think it was damaged that much?"
and he answered:

"Because I could have gotten $10 an acre for the same ground this year, had they have gotten it seeded down last year. Q. Do you know what the ordinary rental of alfalfa land in the Uncompahgre Valley is in that locality? A. About $10 an acre."

This closes his testimony in so far as it pertains to

this item of damages for which the court allowed $400. Nowhere did the witness attempt to state what the rental value of the alfalfa land was for the year 1909, without the re-seeding, nor was there any attempt made on behalf of plaintiffs to prove that without re-seeding it had no value. It will thus be seen that the court allowed the plaintiffs, by way of damages for this particular item, what the full rental value of the land would have been had it been properly re-seeded, and there had been no trampling. Again: The item of $80 found by the trial court on account of extra seed which the plaintiffs were compelled to furnish by reason of the trampling of the land was not sufficiently established by the evidence. Witness Dillon, the tenant, who was the only witness called on this or any other point by the plaintiffs, testified as follows:

"Q. How much more seed did it take to re-seed it (meaning the land that was to be sown in alfalfa) than it did last year before it was tramped? A. They furnished me a little over double the amount of seed this year. I could not tell the exact amount, but it was something over 300 pounds, near 400 pounds, I think. It made a total of something over 600 pounds altogether. Alfalfa seed is worth 20c a pound on the market."

On cross-examination he was asked:

"Q. When you went on that place in 1909 was there much re-seeding needed on this alfalfa field? A. Yes, sir; there was some re-seeding required at that time. *We estimated it at 300 pounds,*" etc.

It is apparent that this testimony is too indefinite and uncertain to warrant the finding that the sowing of $80 worth of extra seed was made necessary by the tramping of the cattle of defendant.

On the trial appellant propounded many questions which we think were competent for the purpose of min-

imizing the damages which plaintiffs sought to recover against him, to every one of which the trial court sustained objections. For instance, the defendant attempted to show neglect on the part of the tenant, Dillon, in the matter of watering the alfalfa crop; that Dillon had a portion of the land planted to beets, and that the water with which he provided himself was utterly insufficient to cover the beet land and the alfalfa land. We think the trial court committed reversible error in sustaining the objections of the plaintiffs to this character of proof, and, for that reason, its judgment must be reversed and the case remanded for a new trial.

Reversed and remanded.

[No. 3676.]

THE MESA DEMAYO LAND & LIVE STOCK CO. v. HOYT.

1. DISEASE—*Communicating.* A flock master who, knowing that his sheep are infected with scab, permits them to range and mingle with the healthy flock of another, without communicating to him their diseased condition, is liable in damages if the disease is communicated to the healthy flock.

2. ACT OF GOD—*Unusual Storm.* A storm occurring at the season of the year when like storms, and storms of equal severity, frequently occur, is not to be regarded as the act of God. To have this effect the storm must appear to have been unprecedented, and one which no human prudence would have anticipated, and provided against.

3. CONTRIBUTORY NEGLIGENCE—*Burden of Proof,* is upon the defendant.

4. —— *Evidence.* To constitute a defense to an action for a tort the contributory negligence of plaintiff must appear to have been a contributing cause of the injury. Defendant's sheep were found at large upon the range, without a shepherd. Plaintiff's herdsmen collected them and drove them to plaintiff's corral, where they communicated scab to the flock of plaintiff. This conduct of the herdsmen was alleged as contributory negligence. But neither plaintiff nor his employees knew of the diseased condition of defendant's sheep, and it appeared that the diseased animals had, by defendant's negli-

gence, before being so taken to plaintiff's corral, exposed plaintiff's flock to the disease. *Held*, therefore, that the defense was not established.

5. APPEALS—*Questions Not Presented Below.* A proposition not seriously contended for in the court below will not be considered in the court of review.

6. —— *Brief in Reply.* A proposition first asserted in the brief in reply will not be considered, unless upon leave granted, and good cause shown.

Appeal from Weld District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. H. E. CHURCHILL, for appellant.

Mr. WILLIAM R. KELLY, Mr. JOSEPH C. EWING, Mr. WALTER E. BLISS, for appellee.

CUNNINGHAM, Presiding Judge.

On the 30th day of July, 1910, the plaintiff Hoyt, appellee here, filed his complaint in the district court, claiming damages on account, as it is alleged, of negligence on the part of the defendant in permitting a band of sheep belonging to it, and which was afflicted with a disease known as scab, to stray from their accustomed range and to become commingled with the sheep of plaintiff, thus communicating the disorder to plaintiff's flock, resulting in the death of many of the latter's sheep, great damage to those that did not die, loss of the wool crop or clip, and heavy expense incident to the treating of his flock while in its diseased condition. From a judgment in favor of the plaintiff, defendant appeals.

It is not denied that defendant's flock was afflicted with scab, or that while in that condition it escaped from the custody of defendant's herdsmen and became commingled with the flock of plaintiff, which was in a healthy condition theretofore. There is no attempt to minimize

plaintiff's damage, and no error is assigned as to the size of the verdict.

In appellant's opening brief, but two grounds for reversal are urged: (a) That the escape of the sheep from the appellant was the result of inevitable accident or act of God; (b) that the plaintiff was guilty of contributory negligence.

1. The first contention is predicated upon the condition of the weather at the time the appellant's flock escaped from its herdsmen, it being contended that the storm was unprecedented, and one against which appellant could not be required to safeguard its flock. There was considerable conflict in the testimony offered on behalf of the parties to this suit as to the extent and severity of the storm in question, but, as we read the record, not a single witness called by the defendant gave testimony that would entitle defendant to invoke the defense here under consideration. Appellant's witnesses spoke of the storm as a "big one," or a "bad one," or "a very severe one," but there is no evidence as to the velocity of the wind, and no attempt to give the temperature, while the amount of snow and rain which fell during the night that the sheep escaped was placed at from five to ten inches, varying with the locality, and the opinion of the various witnesses called for appellant. One of defendant's witnesses testified as follows:

"We generally have snowstorms in October. We expect them at that time of the year. I have been on the range ever since 1884. From that time until the present we expect snowstorms in October."

In *City of Denver v. Rhodes*, 9 Colo., 564, 13 Pac., 729, Mr. Justice Beck, who wrote the opinion, uses this language:

"An 'unusual flood or rain' does not indicate a greater or more severe rain than has heretofore occurred,

but rather, such a rain as does not usually, or but rarely, occurs."

In the same opinion the following language occurs:

"The degree of care or foresight which it is necessary to use must always be in proportion to the injury likely to result from the event rightly to be guarded against; also that such a flood as has been known to occur from a storm within the memory of man should have been anticipated by those in charge of the work of construction."

In order to make this defense (i. e., the Act of God) availing, it was necessary for appellant to show that the escape of its sheep was due to an unprecedented storm, against which human prudence and caution could not guard, and that no act of omission or commission on the part of its employes contributed thereto.

Kansas Pacific v. Lundin, 3 Colo., 94; *City of Denver v. Rhodes, supra; Elliott v. Roswell,* 10 Johns., 1-11, 6 Am. Dec., 306; *The St. Georg.,* 95 Fed., 172; *C. B. & Q. v. Manning,* 23 Neb., 552, 37 N. W., 462; *Bryan v. Rogers,* 96 Cal., 549, 31 Pac., 244; *Gulf Red Cedar Co. v. Walker,* 132 Ala., 553, 31 So., 374.

The evidence in this case fails to establish a state of facts entitling appellant to the defense known as "the act of God."

2. The evidence shows that on the 18th day of October, the day following the night when the sheep escaped from the custody of appellant's herdsmen, appellee's herder found them wandering upon the plains without a custodian. He took charge of them, and, at night, drove them into plaintiff's corral, where they mingled freely with the latter's sheep until October 21st, when appellant's foreman, having learned of their whereabouts, claimed them and drove them away. The disease with

which appellant's sheep were afflicted was, at the time appellee's herder took charge of them, in its incipient stage, and not apparent to the casual observer. Neither appellee nor his herdsmen knew anything of the diseased condition of the sheep. Under these circumstances, to allow the defendant to invoke the doctrine of contributory negligence and thus escape liability would be harsh and unjustifiable. Moreover, there was evidence in the record that the appellant's sheep had, before the day in question, mingled with the appellee's sheep at the latter's watering place. Again, one of the officers of the appellant admitted that if diseased sheep were allowed to bed down upon the prairie, the disease could thus be communicated to other sheep passing over such range. It is apparent that the sheep must have bedded down one night, on or near the range of appellee, before his herdsman took them in charge, and, if he had not taken them in charge, would, in all probability, have spent one or more nights, after the time he took them in charge, upon the range where he found them, hence, the act of plaintiff in caring for defendant's sheep was not only free from negligence, but it cannot be said that his act in this respect was a contributing cause of the communication of the malady, and the burden of proving contributory negligence was on the defendant. The evidence also discloses that the appellant's employes and officers knew that its flock was afflicted with scab, and knew that in that condition they had been mingling freely with appellee's sheep, and yet they never communicated this fact to appellee, or warned him, so that he could take precautionary measures to save his flock by dipping it. On the contrary, the foreman of appellant, when he came to drive the sheep away, and after having been entertained by appellee at his home over night, was asked by appellee regarding the condition of his employer's sheep, and was informed that they

were "clean." The manager of appellant was in the neighborhood at the time the sheep were recovered, and remained there for some twenty days thereafter. He testified that he never notified Hoyt that its sheep had scab, even though he knew they had mingled with Hoyt's sheep, and he knew that his company's sheep were so infected. His only excuse for this gross violation of duty was, "I had reason to believe that he (meaning Hoyt) knew our sheep were infected, as everybody knew it, and I did not publish it in the papers."

3. In his reply brief counsel for appellant, for the first time, raises the question of the insufficiency of the plaintiff's complaint to entitle him to invoke the statutory provision regarding diseased sheep (Rev. Stats., 1908, sec. 6399), and also the ownership of the sheep. In his closing brief, counsel insists that the evidence does not show that the plaintiff had title in the sheep. We are not disposed to consider these contentions, for the reason that they were not seriously, if at all, relied upon by appellant on the trial, nor is anything whatever said concerning them in its opening brief. In *Isabella Gold Mining Co. v. Glenn,* 37 Colo., 172, 86 Pac., 349, it is said:

"It does not comport with good practice for the court to consider points raised by the appellant or plaintiff in error for the first time in his reply brief; certainly unless good cause be shown therefor, and leave of the court be obtained."

By declining to consider appellant's contentions just referred to, we must not be understood as intimating that they were well taken.

The judgment of the trial court is affirmed.

Decided June 10, A. D. 1913. Rehearing denied July 14, A. D. 1913.

[No. 3701.]

EAGAN V. MAHONEY ET ALS.

1. STATUTES—*Construed.* Sec. 255 of the code applies only to a plaintiff in possession.

2. CLOUD UPON TITLE—*Bill to Remove.* It has always been the law in this state that, without the aid of any statute, one claiming title to unoccupied lands may maintain an action to remove a cloud therefrom.

3. —— *Parties.* Lands were conveyed upon trust to dispose thereof and distribute the proceeds between the trustee and the plaintiffs. The trustee refusing to execute the trust, the other beneficiaries therein may, without joining him, have an action to set aside a tax title acquired by a stranger; and this without calling upon the trustee to move in the premises.

4. —— *Coming in of New Parties—Effect.* In the same case the trustee having appeared, answered, and filed his cross-complaint praying the removal of the cloud upon the title, this was held to cure any possible defect in the frame of the suit, so far as related to the extinguishment of the tax title.

5. PLEADING—*Cross-Complaint Against Co-Defendant.* The cross-complaint provided for in the code (Rev. Code, secs. 62, 63) is equivalent to a cross bill in equity. One defendant may exhibit a cross-complaint against a co-defendant, seeking affirmative relief.

6. —— *Waiver.* A defendant in an equity suit who answers both the original complaint and a cross-complaint exhibited against him by co-defendant, will not be heard to deny the right and duty of the court to grant full relief.

7. CLOUD UPON TITLE TO PERSONALTY—*Bill to Remove.* An action may be maintained to remove a cloud from a title to personalty.

8. EQUITABLE CONVERSION—*The Doctrine of,* is an invention of the equity courts for effectuating the intentions of the donor of a trust, not to defeat them. It extends only to those who claim from the same source of title as the trustee, as beneficiary, or through the same instrument, directly from or under the author thereof. It cannot be invoked by one who claims paramount title from another source, which, if sustained, extinguishes the trust estate.

9. EVIDENCE—*Conveyances—Copy of Record.* A deed conveyed lands upon trust that the grantee should dispose thereof, and distribute the proceeds between himself and others named. In an action by the other beneficiaries against a stranger to remove a cloud upon the title, the trustee being also a defendant, gave a deposition in which he testified

to the loss of the deed. *Held* sufficient to admit a copy of the record of the deed under Rev. Stat., sec. 695.

10. —— *Possession of Lands*, is *prima facie* evidence of title in the occupant.

11. APPEALS—*Harmless Error.* The improper admission of evidence offered by plaintiffs is cured by its subsequent offer by a defendant, opposed in interest to its co-defendant, and its admission without objection from such co-defendant.

12. TAX TITLES—*Void Deed.* A treasurer's deed which recites only that copies of one publication of the newspaper containing the notice of the sale were delivered to each subscriber in the county where the lands are situate is void.

13. —— *Recovery of Taxes*, paid by the claimant under the tax title is not allowed without proof of the amount paid. The burden is upon him to prove the amount.

14. LIMITATIONS—*The Five Years' Statute* (Rev. Stat., sec. 5733) is no bar to an action to remove a cloud upon the title to land.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MESSRS. SCHUYLER & SCHUYLER, Mr. HENRY TROWBRIDGE, for appellant.

Mr. JOHN H. REDDIN, Mr. J. R. ALLPHIN, for appellees.

KING, J., delivered the opinion of the court.

July 20th, 1892, Michael Mahoney conveyed to his brother, John, one of the defendants in this case, the legal title to lots 39 and 40, block 22, Colfax Avenue Park Subdivision of the city of Denver, in trust. The conditions of the trust were expressed in a writing of even date with the deed, and provided that said John Mahoney should dispose of the lots to the best advantage, and, out of the proceeds, retain one-fifth thereof for his own use, and pay one-fifth thereof to each the father, mother, sister and another brother of the said donor, and trustee. The trust was never executed. November 19th, 1903, a treasurer's tax deed was executed and delivered by which

said lots (with others) were conveyed to W. C. Mitchell, pursuant to a tax sale made November 13th, 1900, for the unpaid taxes of 1899. This treasurer's deed was recorded December 28th, 1903. Thereafter such title as Mitchell received by said deed vested by *mesne* conveyances in Eagan, one of the defendants, appellant herein. March 27th, 1909, the *cestuis que trust* above named, except said John Mahoney, commenced this action against the trustee, alleging the failure and refusal of the trustee, after repeated requests, to execute the trust; that plaintiffs were entitled to have the property partitioned among themselves, or disposed of as provided in the trust agreement, and the proceeds thereof divided; that the property was so situated that it could not be conveniently partitioned among the five persons interested, and prayed that the trust be executed, either by partition of the property, or a sale thereof, and division of the proceeds. Plaintiffs also alleged that the defendant, Eagan, claimed some interest or estate in said real property adverse to plaintiffs, which was a cloud upon plaintiffs' title and interest, and asked that said cloud be removed and the title quieted. To this complaint Eagan made answer admitting his claim, and alleging that he was the owner of said property in fee simple under and by virtue of the treasurer's tax deed hereinbefore mentioned, and in aid thereof invoked the bar of the five-year statute of limitations, namely, sec. 3904, Mills' Ann. Stats. To this answer plaintiffs replied admitting the execution and record of the treasurer's tax deed, but alleged that it was void for reasons appearing on its face, and *aliunde*. Thereafter the defendant, John Mahoney, made answer admitting all the allegations of plaintiffs' complaint, and filed cross-complaint against his co-defendant, Eagan, in which he set forth, in substance, all the allegations of plaintiffs' complaint; that he held the legal title to the property in trust; that said Eagan claimed some interest under and

by virtue of the treasurer's tax deed aforesaid; that said tax deed was void, and a cloud on his title, and asked that the same be removed. To this cross-complaint Eagan filed answer, alleging paramount title under said tax deed, denying its invalidity, and praying that he be declared to be the owner of said premises in fee simple. All the pleadings allege or admit that the real estate in controversy was vacant and unoccupied at the time of the beginning of the suit. After the issues were made up the defendant, Eagan, filed supplemental answer alleging that since the said suit had begun he had taken actual possession of the lots, but, upon motion, this answer was stricken. Judgment was rendered in favor of plaintiffs upon their complaint, and in favor of the defendant, John Mahoney, upon his cross-complaint, ordering the execution of the trust, the sale of the property and division of the proceeds, and quieting the title as against the defendant, Eagan.

1. The first question raised by appellant is that plaintiffs had no interest in the real estate which constituted the trust fund, upon which a suit to quiet title or remove a cloud could be predicated. This claim is based on the terms of the trust in consequence of which it is asserted that the real estate, by the operation of the doctrine of equitable conversion, was immediately transmuted into personalty, and therefore plaintiffs, as beneficiaries of the trust, had no *estate,* legal or equitable, in the lots as realty, but in the proceeds only; and that a suit to quiet title, brought under section 255 of the civil code, does not lie to that class of property.

As presented upon the facts of this case the question seems to be a novel one in this state, and we know of no decided case squarely in point. But we think the contention should not be sustained. In the first place, the action is not brought under section 255 of the code, which applies only to a plaintiff in possession of realty, nor un-

der any other provision of the code, as it was alleged that at and prior to the suit the lots were vacant and unoccupied. It has always been the law of this state, without the aid of statute, that a person claiming title to vacant and unoccupied lands may maintain an action to quiet the title or remove a cloud therefrom.—*Lambert v. Murray,* 52 Colo., 156, 120 Pac., 415. Again, if it be conceded that plaintiffs had no estate, legal or equitable, in the lots as realty, using the term "estate," as sometimes limited, to mean real ownership, nevertheless we think they had such interest in the trust fund, although realty, the legal title to which was in the trustee, as to make them proper parties plaintiff in a suit to remove a cloud that would embarrass if not make impossible the execution of the trust by sale of the property for a fair value, or if permitted to remain might, through operation of the statutes of limitation, extinguish the fund itself; and particularly when, as in this case, the trustee has failed and refused to act and a suit has become necessary to enforce the trust. But, even if the equitable interest of the *cestuis que trust* is in personal property, a suit to remove a cloud from their title to such personalty may be maintained. Although authority to the contrary is found, it is so held by other, and we think better, authority.—Pomeroy's Code Remedies, 4th ed., sec. 266; *Earle v. Maxwell et al.,* 86 S. C., 1, 67 S. E., 962; *Magnuson v. Clithero,* 101 Wis., 551, 77 N. W., 882; *Sherman v. Fitch,* 98 Mass., 59; *New York & New Haven R. R. Co. v. Schuyler and Others,* 17 N. Y., 592. It must be evident that, in this case, any distinction between real and personal property is purely artificial, and to make it would tend to hinder the practical administration of justice. Moreover, the doctrine of conversion is a creation or invention of equity jurisprudence applied for the purpose of effectuating the intention of the donor of a trust, not to defeat it; and its effects extend only to those persons who claim prop-

erty through the same source of title as the trustee or beneficiary, or through the same instrument, or directly from or under the author of the instrument. It cannot be invoked by the appellant here who claims paramount title from another source, which, if good, extinguishes the trust estate.—Pomeroy's Equity Jurisprudence, 3rd ed., sec. 1166, and cases cited.

Notwithstanding the fact that the trustee might and should have brought suit to quiet the title or remove the cloud, nevertheless it is manifestly unreasonable to insist that, as a condition precedent to plaintiffs' right to sue, they must show a demand upon and refusal of the trustee to so move, when the trustee has evaded or neglected performance of his duties and for that reason is a necessary party defendant to this proceeding for the judicial enforcement of the trust. With or without joining the trustee, plaintiffs were proper parties to this branch of the suit.—*Munson v. Marks,* 52 Colo., 553, 124 Pac., 182. But if there should be any question as to that ruling, by the filing of the cross-complaint all necessary and proper parties were in court praying that title be quieted.

2. Counsel's claim that the defendant Mahoney's cross-bill or cross-complaint cannot be sustained as a cause of action against the defendant, Eagan, for the purpose of quieting title as against him, because the same is not defensive, and therefore not a counter-claim such as the code provides, cannot be upheld. The counter-claim or cross-complaint mentioned in sections 56 and 57, Mills' Ann. Code, is equivalent to a cross-bill in equity practice.—*Allen v. Tritch,* 5 Colo., 222; *Travelers' Ins. Co. v. Redfield,* 6 Colo. App., 190, 40 Pac., 195. The proceedings herein are equitable in character, and instances of cross-bills in equity by one defendant against a co-defendant are numerous. The fact that the affirmative relief sought by this cross-complaint is in the nature of an original bill, seeking the court's aid beyond the pur-

poses of defense, to the original complaint, does not make the plea obnoxious to the provisions of the code concerning counter-claims.—*Crisman v. Heiderer,* 5 Colo., 589. The relief prayed for in the cross-complaint was the same in part as that in the original complaint, and necessary to a complete determination of the matters in litigation, and the plea was therefore permissible under the code, even as against a co-defendant in the action.—*Derbyshire v. Jones,* 94 Va., 140, 26 S. E., 416; *Whittemore v. Patten,* 84 Fed., 51; *Perkins Oil Co. v. Eberhart,* 107 Tenn., 409, 64 S. W., 760; *Krueger v. Ferry,* 41 N. J. Eq., 432, 5 Atl., 452. Furthermore, the defendant, Eagan, answered both the complaint and the cross-complaint, setting up affirmatively his own title and asking that it be quieted, and he may not now be heard to successfully deny the right and duty of the court to make a complete determination of the questions at issue.

3. Error is assigned because of the admission in evidence of a certified copy of the record of the deed from Michael Mahoney to John Mahoney, instead of the original deed, it being asserted that there was not sufficient proof under section 695, Revised Statutes of 1908, which provides that certified copies of the record of deeds of this character "may, upon affidavit of the party desiring to use the same, that the original thereof is not in his possession or power to produce, be read in evidence with like effect as the original of such deed." It is shown in the deposition of John Mahoney that he saw the deed executed, received the same and recorded it, and that it was thereafter lost. This was a sufficient showing to admit the certified copy, when offered by the cross-complainant. Objection was also made, for the same reason, to the admission of a certified copy of the record of another deed offered by plaintiffs, and in the absence of any showing, by affidavit or otherwise, to excuse the production of the original, it was admitted. If it be granted

that this was error, nevertheless we think it was not prejudicial for the reason that upon subsequent offer of the same certified copies by the defendant, John Mahoney, in support of his cross-complaint, the deed was received in evidence without objection. The evidence showed that long prior to the inception of the tax title, Michael Mahoney, in possession of the lots in question as owner thereof, made his warranty deed purporting to convey the same in fee to his brother, John. This was *prima facie* proof of ownership, and sufficient to put the appellant upon proof of his title under his alleged tax deed.—*Mitchell v. Titus,* 33 Colo., 385, 180 Pac., 1042.

4. The next question to be determined, and the only substantial question affecting the merits of the case, and upon which its final determination must rest, is as to the validity of the treasurer's tax deed. This deed, upon its face, conveys a number of non-contiguous town lots, for a gross sum, without specifying the amount for which any of the said separate tracts were assessed or sold. It contains no recitation that notice of intention to take out the deed was given, nor that the lots herein in litigation, or any or all the lots described in the deed, were assessed for a sum less than $250, and therefore does not show a compliance with the provisions of the statute necessary to confer power upon the county treasurer to execute the deed.—*Treasury T. M. & R. Co. v. Gregory,* 38 Colo., 212, 88 Pac., 445; *Richards v. Beggs,* 31 Colo., 186, 72 Pac., 1077; *Mitchell v. Trowbridge,* 47 Colo., 6, 105 Pac., 878. Under the decision of this court in *Vanderpan v. Pelton,* 22 Colo. App., 357, 123 Pac., 960, we think the deed may be held void upon its face. But if conceded to be valid upon its face, it must be held invalid because the affidavit of publication of the notice of tax sale pursuant to which the treasurer's deed was executed and delivered, fails to show (1) that a copy of the notice of said tax sale was published in the manner or for the time provided by

law, and (2) fails to show that copies of each number of the paper in which the notice and list were claimed to have been published, were delivered by carriers or transmitted by mail to each subscriber, according to the accustomed mode of business of the office. It states only that copies of the paper containing the list, and copies of one publication of the paper containing the notice, were delivered to each subscriber in Arapahoe county. A sale based on such affidavit is invalid.—*Rustin v. Merchants' & M. T. Co.,* 23 Colo., 351, 47 Pac., 300; *Charlton v. Kelly,* 24 Colo., 273, 50 Pac., 1042; *Lambert v. Shumway,* 36 Colo., 350, 85 Pac., 89; *Mitchell v. Knott,* 43 Colo., 135, 95 Pac., 335.

The collector of rare specimens of legal documents searching in this jurisdiction for a valid tax deed will need to make diligent inquiry. The holder of a tax deed may, however, for the present, rely with confidence upon the belief that his deed affords security for any repayment of the taxes as a condition precedent to the cancellation of his deed, unless haply, as in this case, through inadvertence or otherwise, he fail to offer proof of the amount of taxes paid. Plaintiffs offered to do equity by making repayment, if advised as to the sum required, but appellant offered no proof, and this court cannot supply the deficiency nor reverse the judgment in order to provide an opportunity for the defendant to make the showing that he declined to make upon the trial.—*Eaches v. Johnson,* 46 Colo., 457, 104 Pac., 940; *Empire R. & C. Co. v. Lanning,* 49 Colo., 458, 113 Pac., 491; *McCracken v. Cones,* 53 Colo., 321, 125 Pac., 497.

5. The plea of the five-year statute of limitations above referred to cannot operate as a bar in an action to quiet title or remove a cloud.—*Munson v. Marks,* 52 Colo., 553, 124 Pac., 187; *Empire R. & C. Co. v. Mason,* 22 Colo. App., 612, 126 Pac., 1129.

For the reasons given the judgment is affirmed.

[No. 3621.]

THE FIRESTONE COAL COMPANY ET AL. v. MCKISSICK.

1. APPEALS—*Pleadings Disregarded in the Trial Below*, are not considered in the court of review.

2. AGREEMENT FOR SALE OF LAND—*Duty to Record.* One who enters into an agreement for the sale of land to a corporation is not under duty to the stockholders of such corporation to record the agreement. Nor can such vendor be charged with frauds practiced by the promoters of the corporation upon those purchasing stock, of which the vendor has no knowledge, even although his conveyance has vested title in the corporation, and the omission to record an agreement touching purchase money facilitates the commission of the frauds.

3. FRAUD—*Irregular Corporate Action—Ratification.* One of the promoters of a corporation sells shares therein upon representation that the corporation is the owner of certain lands. In fact, a large sum of money is due on account of the purchase of the same land, and this is later secured by mortgage. Pending an action to foreclose the mortgage the stockholders, at a meeting regularly called, vote to accept the promissory note of the promoter for the amount of the mortgage debt, "in liquidation" thereof. *Held* a ratification of the transaction resulting in the mortgage and all corporate irregularities therein.

4. CORPORATIONS—*Mining, Etc., Co.—Power to Encumber Mines or Plant.* Sec. 865 of the Revised Statutes is intended for the protection of the stockholders of the corporation only. The corporation itself will not be heard to dispute the validity of a mortgage of its mines or plant, otherwise valid, upon the ground that it was executed without the approval of the shareholders.

And a mortgage executed by coal mining company, of land not shown to contain coal, and upon which no part of the machinery or plant of the company is located, so that the power of the corporation to carry on its mining is in no manner interfered with, is not within the statute.

5. CONTRACT—*For Attorneys' Fees—Validity.* Stipulation in a mortgage of lands that in case of foreclosure the mortgagee shall be allowed an attorney's fee is a valid agreement.

Appeal from Weld District Court. HON. HARRY P. GAMBLE, Judge.

Mr. HORACE N. HAWKINS, and Messrs. ORAHOOD & HURLBUT, for appellants.

Mr. GUY D. DUNCAN, Mr. GEORGE B. CAMPBELL, for appellee.

CUNNINGHAM, Presiding Judge.

On April 27, 1908, plaintiff filed her bill in the district court for the purpose of recovering from the Denslow Coal and Land Company, a corporation, on three promissory notes, and to foreclose three mortgages given to secure said notes, each note being secured by a mortgage on different pieces of real estate. The complaint is in the ordinary form in such cases. Judgment went for plaintiff. The Denslow Company was made the sole defendant. The Firestone Coal Company is the successor to the Denslow Company, the name having been changed during the month of October, 1908, some nine months after the Denslow Company had answered. The original transaction out of which the controversy arises consisted of the sale by appellee, hereinafter referred to, for convenience, as plaintiff, to the Denslow Company of a quarter section of coal land situate in Weld county. At the time the sale of this land was being arranged for, an agreement, dated March 12, 1907, was entered into between the plaintiff and the promoters of the Denslow Company, which was then being organized, which agreement provided in substance that plaintiff was to give a deed to the Denslow Company in consideration of $24,000 to be paid to herself and one William McKissick, who is not shown by the record to be in any way related to the plaintiff, $15,000 to be paid to plaintiff and $9,000 to William McKissick, or to William McKissick as trustee. This agreement provided that the $15,000 which plaintiff was to receive should be paid in installments. We need not concern ourselves further about the $9,000 which was to be paid to William McKissick, trustee.

In order to secure the payments due plaintiff, it was provided that the entire capital stock of the company

should be transferred by the company to Cole and Curtis (except one share to each of the other promoters to qualify them as directors), all of which stock was to be assigned in blank by the parties to whom it was issued, and these certificates of stock, together with the books, seal and other paraphernalia belonging to the company, placed in the hands of Thomas Keeley as escrow holder or trustee, portions of the stock to be released by Mrs. McKissick, or by said Keeley, from time to time as payments were made by the company upon the land. Time was made the essence of this agreement, and forfeiture of the sums paid provided for. The escrow holder, in the event of forfeiture or default by the corporation in making the payments on the land, was to deliver the certificates and all papers in his hands to plaintiff, and all previous payments were to be considered as liquidated damages. It was further provided in said agreement that in the event of forfeiture, and delivery of the stock and effects of the company by Keeley to plaintiff, "said company shall thenceforth cease to have any interest in said company or land aforesaid." This agreement was never placed upon the county records, but the deed given by Mrs. McKissick to the company for the land was placed of record. The company failed to perform the conditions of the aforesaid agreement, after having made certain payments upon the land, and the balance of the stock in the hands of Keeley, which had not been released by him, was turned over to plaintiff, together with the books and seal of the company. Thereafter, after negotiations covering a considerable period, an agreement was reached between herself and the officers of the company actively in control thereof, whereby the three notes and mortgages here sued upon were executed by the officers of the company and delivered to plaintiff. Thereupon, she redelivered the certificates of stock and effects of the company to its officers. These three notes and mortgages all bear

date September 12, 1907. The mortgages contained the following recitations: that the Denslow Coal and Land Company is justly indebted to Mrs. McKissick in the sum of $2,500 (each note being for that amount, the three notes aggregating $7,500), and each of the mortgages further recites that the company: "has good right, full power and lawful authority to grant, bargain and sell the same (meaning the land described in the mortgage) in manner and form aforesaid." Each of the notes was signed, "The Denslow Coal and Land Company, George G. Denslow, President, E. C. Curtis, Secretary," and bore the seal of the company, and recited that they were sealed and delivered in the presence of G. K. Andrus, at that time the attorney for the company.

1. The first answer filed by the defendant company (the one filed before it changed its name from The Denslow Land Company to the Firestone Coal Company) admits the execution of the notes and mortgages, and sets up other defenses not necessary for us to consider (a) because there was no proof whatever to support said defenses, (b) because the second answer filed by the company (after it had changed its name to the Firestone Coal Company) was the one upon which the case appears to have been tried, although the first answer was never withdrawn. The second answer of the company admits, "that the three mortgages herein alleged as having been given to secure said promissory notes were apparently given and executed by the said Denslow Coal and Land Company and recorded," as alleged. The second answer charged by way of defense a conspiracy entered into between the plaintiff and the original promoters of the company for the purpose of defrauding the stockholders of the company, and proposed purchasers of its stock. It appears that Curtis, one of the promoters, went to Ohio and sold a considerable amount of this stock at par. (The second aswer was filed and the case defended by

these Ohio stockholders, or at their instigation.) The answer avers that Mrs. McKissick had full knowledge of Curtis's transactions in Ohio, and the fraud which it is charged he perpetrated through misrepresentations upon the Ohio purchasers of stock. It is sufficient to say that the evidence fails to support this allegation. It is probable that the indebtedness of the company to Mrs. McKissick was not disclosed by Curtis, or anyone else connected with the company, to the Ohio purchasers of stock; on the contrary, the record would indicate that they had been advised by Curtis that the company owned the Mrs. McKissick land, and that it had been fully paid for. But there is no evidence indicating that Mrs. McKissick had any knowledge whatever of these misrepresentations. Complaint is made that the agreement herinbefore referred to between Mrs. McKissick and the original promoters was never made a matter of record. It is sufficient on this point to say that Mrs. McKissick owed no duty to the company, or to the purchasers of stock in the company, which required her to record the agreement. The balance due from the company to Mrs. McKissick on the land was $7,500. It appears that long after this suit was brought by Mrs. McKissick, the company accepted a note from Curtis for $7,500. A resolution authorizing the company to accept this note reads as follows:

"Moved by J. W. Buchanan and seconded by C. S. Buchanan, resolved that the stockholders in meeting assembled hereby agree to accept E. B. Curtis's note in the sum of $7,500 in liquidation of the balance due on the land. The question being put, all present voted aye."

The Buchanans were two of the Ohio purchasers of stock, and appear to have largely represented the company and the other eastern stockholders, after its change of name. J. W. Buchanan attempted to explain this resolution and the acceptance of Curtis's note. He testified that this note had no connection whatever with the amount

which the plaintiff claims in this action. His son, Clarence Buchanan, who was present at the stockholders' meeting and seconded the motion or resolution authorizing the taking of Curtis's note, testified as follows concerning this meeting and said resolution:

"Q. Curtis at this same meeting agreed to pay to the company $7,500 *on account of this McKissick claim,* didn't he? A. He did."

No other witness present at that meeting, although it was a stockholders' meeting, was called to testify on this subject. Mr. Curtis himself was present at the trial and frequently on the stand, but the defendant made no attempt to show by him that the $7,500 note so given by him to the company nine months after this suit was brought, was not given in satisfaction of the balance which the company owed Mrs. McKissick, and which is represented by the notes here in suit. Under these circumstances, the trial court was certainly warranted in finding that the company, by direction of its stockholders, had voluntarily accepted the Curtis note for the amount which Mrs. McKissick was suing for, and hence whatever irregularity (hereinafter to be referred to) there may have been in the transaction culminating in the notes and mortgages here sued upon, the same had been waived and the transaction ratified by the company pursuant to a resolution unanimously passed at a stockholders' meeting apparently regularly called. If so, it being undisputed by the evidence that there was a balance due Mrs. McKissick of $7,500, that is, that she had not received the full purchase price of the land by that amount, then the company would unquestionably be liable on the notes, or estopped from denying its liability, which comes to the same thing.

2. The company, in the second answer filed by it, pleads want of authority in the officers to execute the notes and mortgages in question. This defense is predi-

cated upon section 865, Revised Statutes of 1908, which provides that:

"The board of directors or trustees of a mining or manufacturing corporation shall not have power to encumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant, until the question shall have been submitted at a proper or regular meeting of the stockholders, and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property without such consent shall be absolutely void, and the vote upon such proposition shall be entered upon the minutes of the corporation."

In the original opinion handed down in this case, we ruled that by the articles of incorporation of the defendant company it was not entitled to invoke the protection of the section of the statute just quoted, for the reason that it was engaged in many other ventures than that of mining, and that a company engaged in various occupations, even though engaged in mining, was not a mining company in the contemplation of section 865. We now withdraw so much of our original opinion as pertains to this feature of the case, and we purposely express no opinion thereon.

In January of the present year the circuit court of appeals of the eighth circuit had under consideration section 865 of our statute, and in an elaborate and well reasoned opinion, supported by a vast array of authorities, state and federal, it is expressly ruled that the defense here interposed, i. e., want of authority in the directors to execute a mortgage without a vote of the stockholders of the corporation, could not be raised by the corporation, but that the stockholders, and they alone, had the right to assert this defense. We refer to the case of *Westerlund v. Black Bear Mining Company,* 203 Fed., 599. Judge

Sanborn, speaking for the court, after a most careful consideration of the authorities, including the decisions of our own state, to which we shall presently refer, at page 613, uses this language:

"But a corporation which has executed and accepted the benefits of a contract within the scope of its powers, that is neither wrong in itself nor against public policy, and that is defective only because in its execution the corporation has failed to comply with some legal requirement enacted for the sole benefit of third persons, is estopped to assail it, and the beneficiaries of the requirement alone may avoid it. Hence the stockholders of this corporation, and they alone, have the right to avoid this lease, because they alone had any interest in a compliance with the legal requirement that they should assent to its execution."

No good purpose can be subserved by further quoting from the opinion in the Westerlund case, since it is readily accessible to the parties here concerned and to the profession as well. We might observe, however, that in *Carlsbad Water Company v. New,* 33 Colo., 389, 81 Pac., 34, decided in 1905, it appears that our supreme court ruled that it is competent for the trustee in bankruptcy of a corporation to invoke the provisions of the statute here under consideration. But it does not appear from the opinion that the point raised by Judge Sanborn in the Westerlund case, viz.: that only the stockholders of the corporation, for whose benefit the section of the statute was passed, could invoke its provisions, was in any manner called to the attention of or considered by our supreme court in connection with the Carlsbad Water Company case. We have examined the briefs filed in the Carlsbad case, both the original briefs and those filed on rehearing, without being able to discover that this matter was even mooted in that case. Judge Sanborn, considering the Carlsbad case, calls attention to the fact that it is

the only one that has come to his attention in which it has been held that a corporation has the right to challenge its otherwise valid transactions on the ground that they were made without the required consent of its stockholders. And Judge Sanborn further calls attention to the fact that our supreme court in making this ruling indulged in no reasoning to support it, but relied upon *McShane v. Carter,* 80 Calif., 310, 22 Pac., 178, and *Perkins Mining, Etc., Co. v. Kennedy,* 81 Calif., 356, 22 Pac., 679, both of which were, in 1911, overruled by the California supreme court in *McKee v. Title Insurance and Trust Co.,* 159 Calif., 206, 113 Pac., 140, after the error in the two earlier California cases had been pointed out by the federal court in *Campbell v. Argenta Gold & Silver M. Co.,* 51 Fed., 1. The answer in this case was filed by the defendant corporation, and in its name; no attempt appears to have been made by the stockholders to avail themselves of the provisions of our statute hereinabove quoted, and therefore, we must rule that the provisions of section 865, Revised Statutes, cannot avail the defendant in this case.

3. We have re-examined the record, and are not convinced that the board of directors in this case (assuming that they were without authority from the stockholders and that such authority was a condition precedent) included within the mortgages here under consideration, "the mines or plant of such corporation or the principal machinery incident to the production from such mine or plant." As Judge Sanborn, in the Westerlund case, *supra,* observes, "it was the power to hinder or prevent the production by the corporation from its mine or plant by incumbering, either the mine or the plant, or of the principal machinery incident to the production, that was by our statute clearly and expressly withheld from the board of directors and officers of the corporation in the absence of an approving vote of the stockholders." The

evidence in the instant case tends to show that some of the land that had been platted by appellant as town lots, and which was included in these mortgages, had been pierced by a tunnel which appellant had run from the main shaft of its mine, but there was no evidence tending to show that coal had been discovered in said tunnel, or upon said lots, or that the work of mining was being prosecuted therein or thereon, and it is clear that no part of the machinery or plant of appellant was located upon the lots included in the mortgages. Hence it does not appear that the conveyance of these lots by the board of directors tended to hinder or prevent the production of coal by appellant, and it affirmatively appears from the record that the mortgages can in no manner interfere with the corporation's right to operate its principal machinery incident to the production of coal.

4. Objection is made by defendant to the allowance of attorney's fees by the court. All the notes sued upon, and the mortgages securing them, provide for an attorney's fee in case of foreclosure, and the amount thereof was stipulated by the parties in these various instruments, and the amount so stipulated was allowed by the court. It has been determined in *Byers v. Investment Co.*, 10 Colo. App., 78, 50 Pac., 368, that an attorney's fee thus stipulated may be collected and is properly included in a judgment or decree rendered on a contract providing therefor. The first answer filed by the company raises no objection whatever to the notes and mortgages, that is, it is not contended that the company was not liable on them at the time they were given. The second answer filed after the company had changed its name makes no specific objection to the provisions contained in the notes and mortgages for an attorney's fee. Indeed, no objection was raised and no reference made throughout the trial to an attorney's fee until the coming in of the decree, when counsel for defendant excepted to the

same. We are satisfied, in the circumstances of this case, that the trial court committed no error in allowing attorney's fees.

There are other considerations strongly supporting plaintiff's equities, which we have not deemed it necessary to comment upon.

The judgment of the trial court is affirmed.

The original opinion filed by us will be withdrawn, and this opinion substituted therefor.

HURLBUT, Judge, being of counsel in the case, not participating.

Decided July 10, A. D. 1913. Rehearing denied July 14, A. D. 1913.

[No. 3571.]

GRAND CIRCLE, WOMEN OF WOODCRAFT, V. RAUSCH ET AL.

1. FRATERNAL BENEVOLENT SOCIETIES—*Construction of Certificate.* The certificate of a fraternal benevolent society is construed by the same rules of interpretation which control the construction of other contracts.

2. —— *Validity of Conditions.* A forfeiture of the contemplated benefits, declared by the explicit provisions of the certificate, will be enforced, if not opposed to any rule of public policy.

A condition that "if the member be murdered by the beneficiary, or the beneficiary cause the death of the member, directly or indirectly, intentionally or accidentally," the benefits otherwise payable shall revert, is a valid condition.

The member was killed by the beneficiary while the latter was insane. Held, there could be no recovery.

3. —— *Conditions Not Read by the Member.* That the conditions of the certificate are not specifically called to the attention of the member is immaterial.

4. EVIDENCE—*Survivorship.* In an action upon the certificate of a fraternal society, by the heirs of the deceased beneficiary, it appearing that both the beneficiary and the certificated member came to their death upon the same occasion, the evidence examined and held that the probabilities are that the beneficiary was the survivor.

Appeal from El Paso District Court. HON. JAMES OWEN, Judge.

Mr. B. M. CARR, for appellant.

Mr. FRANKLIN J. BAKER, for appellees.

BELL, J.

The appellant is a fraternal benefit society, created and existing by virtue of the laws of the state of Colorado; and its objects are the maintenance of a fraternal benefit society on the lodge plan, with a secret ritual, to provide and maintain, by means of assessments upon its members, a benefit fund from which shall be paid to designated relations or dependents of each deceased member, who, at the time of death, is in good standing by having paid all lawful demands in due time, a sum not exceeding $2,000, $1,000 if the insured dies in one year, $1,500 if the insured dies between one and two years, $2,000 if the insured dies after three years after being admitted as a member, and a small sum to mark the grave.

The insured lived as a member fifteen months and seven days. Her expenses, under her certificate, were an initiation fee and an assessment of $1.40 during her life at fixed periods. We do not know the exact amount which she paid, but her investment, under the certificate, is probably very small. The amount of the judgment is $1,375.65.

On the 22nd day of July, 1909, the parties hereto submitted the case to the court, on an agreed statement of facts, for its decree, which agreed statement of facts is as follows:

"It is hereby agreed by and between the above named plaintiffs, by Frank J. Baker, their attorney, and the above named defendant, by B. M. Carr, its attorney, that the following shall be, and they are hereby declared to

be, the agreed statement of facts upon which this case shall be submitted for trial to the district court of said county of El Paso:

"First. That Anna M. Workhausen is the duly appointed, qualified and acting guardian of Mary Rausch and Minnie Rausch, who are minors and the sole heirs of Conrad Rausch and Minnie Rausch, husband and wife, both deceased.

"That the defendant corporation is a fraternal benefit society, not for profit, organized under the laws of the state of Colorado.

"That the said Minnie Rausch was a member of said society, holding certificate No. 63762 therein, for the principal sum of two thousand dollars ($2,000) with benefits thereunder payable to Conrad Rausch, her husband.

"That the said Minnie Rausch signed her application for the membership in said society, and the certificate issued to her, as aforesaid, without having her attention called specifically to the conditions upon the back of said certificate, or contained in the application and constitution and by-laws of said society. Said certificate issued to Minnie Rausch as aforesaid contained the following condition:

" 'This certificate is hereby made expressly subject to all conditions endorsed or printed hereon, all of which are hereby made a part hereof, whether printed upon the face or back, and also all conditions named and provided in the constitution of the Women of Woodcraft adopted by its Grand Circle and by the by-laws of said circle. It shall not be enforced at any time when the neighbor to whom it is issued stands suspended, or is not in good standing pursuant to the provisions of said constitution and by-laws, as the same are now in force or as they may be hereafter regularly adopted or amended and in force at the time of the death of the neighbor named in this certificate.'

"Second. That, on or about the 1st day of January,

A. D. 1907, the bodies of Minnie Rausch and Conrad Rausch, who was named as the beneficiary under the said certificate of membership in the defendant association, were both found dead; that the skull of Minnie Rausch was crushed and brains protruding, from the blows of a blunt instrument, and her body was covered with numerous stab wounds and blood, and lying upon the floor; and the body of Conrad Rausch was found lying upon the bed unwounded but so contorted that the circumstances pointed strongly to murder and suicide, but as to which died first is not definitely decided.

"That the said Conrad Rausch inflicted said wounds upon the body of Minnie Rausch which caused her death, and then took his own life while of insane mind.

"Third. That the defendant society refuses payment under said certificate No. 63762 because of the condition thereon rendering the same null and void and the benefits thereunder forfeited in the event that the member is killed by the beneficiary.

"That the printed condition upon the back of said certificate No. 63762 issued to Minnie Rausch, as aforesaid, was as follows:

" 'If the member to whom this certificate shall be issued shall be murdered by any beneficiary named herein, or who may claim benefits hereunder, or should any beneficiary named in this certificate, or who may claim benefits hereunder, cause the death of any such member directly or indirectly, intentionally or accidentally, then any benefits which such beneficiary might otherwise have received under the provisions of this certificate shall revert to the Grand Circle.'

"In Witness Whereof, We have hereunto set our hands this 30th day of June, A. D. 1909.

"FRANK J. BAKER,
"Attorney for Plaintiff.
"B. M. CARR,
"Attorney for Defendant."

The result of this case must depend largely upon the construction of the terms used in the printed condition upon the back of certificate No. 63762, which reads as follows:

"If the member to whom this certificate shall be issued *shall be murdered by any beneficiary named herein* * * * or should any beneficiary named in this certificate * * * *cause the death of such member directly or indirectly, intentionally or accidentally,* then any benefits which such beneficiary might otherwise have received under the provisions of this certificate shall revert to the Grand Circle."

Counsel for appellant does not contest the sufficiency of the insanity of the beneficiary, set up in the agreed statement of facts, to render him incapable of distinguishing between right and wrong relating to the killing of the insured, and, therefore, we shall assume that there was no intent to murder; hence, no murder committed. If the beneficiary was so insane as aforesaid, then he would likewise be not guilty of any intentional killing. The agreed statement of facts shows that no intermediate means were used to bring about the insured's death; hence, there has been no indirect killing. The killing was not done accidentally, unless the killing by a person so insane as to be incapable of distinguishing between right and wrong relating thereto may legally be called an accidental killing.

From an early date in England, as well as in this country, the courts have often referred to self-destruction or suicide by insane persons as accidental killings, and it is quite probable that the framers of the certificate or policy of insurance in this case meant to use the word "accidentally" in the same sense. However, we have no judicial authority for so applying the term to a killing by an insane beneficiary.—*Borradaile v. Hunter,* 5 Man. & Gr., 646, 651, 654, 44 E. C. L., 339, 342, 343; *Pierce v.*

Travellers' Life Ins. Co., 34 Wis., 389, 396; *Breasted v. Farmers' L. & T. Co.*, 8 N. Y., 299, 306, 89 Am. Dec., 482; *Marceau v. Travellers' Ins. Co.*, 101 Cal., 346, 35 Pac., 856, 36 Pac., 813.

Counsel, under stipulation in agreed statement of facts, concede:

"That on or about the 1st day of January, A. D. 1907, the bodies of Minnie Rausch and Conrad Rausch, who was named as beneficiary under the said certificate of membership in the defendant association, were both found dead; that the skull of Minnie Rausch was crushed and brains protruding from the blows of a blunt instrument, and her body was covered with numerous stab wounds and blood, and lying upon the floor; and the body of Conrad Rausch was found lying upon the bed unwounded, but so contorted that the circumstances pointed strongly to murder and suicide, but as to which died first is not definitely decided.

"That the said Conrad Rausch inflicted said wounds upon the body of Minnie Rausch which caused her death, and then took his own life while of unsound mind."

It seems hardly possible that the beneficiary could have so crushed the skull of the insured that her brains should have protruded, without causing instant death, or death before the beneficiary could have taken poison, and suffered the death that his condition would seem to indicate.

The application of the insured for the certificate, and the certificate or policy itself, clearly indicate that it was the mutual intention of the parties that if the beneficiary, *directly or indirectly, intentionally or accidentally,* or *by murder,* caused the death of the insured that all benefits which would otherwise go to the beneficiary or his successors in interest should revert to the grand circle.

These stipulations are clear and explicit and should be kept inviolate and enforced against the beneficiaries,

unless such enforcement would be contrary to a sound public policy.

The ordinary life insurance policy is attended with certain well known canons of construction peculiar thereto, beyond which the ordinary rules of construction, pertaining to other contracts, apply.

This court, in speaking to this point, tritely said:

"It has been repeatedly decided in this state that the policy is the contract of insurance, and that it is to be considered and construed by the same rules of construction and interpretation as other contracts, so as to carry out the intention of the parties."

Daly v. The Concordia Fire Ins. Co., 16 Colo. App., 350, 65 Pac., 416; *Ins. Co. v. Taylor,* 14 Colo., 499, 24 Pac., 333, 20 Am. St., 281; *Ins. Co. v. Barker,* 6 Colo. App., 535, 41 Pac., 513.

The supreme court of Indiana, speaking to the same question, said:

"While forfeitures are never favored, yet if upon a reasonable construction it appears that the parties contracted for a forfeiture upon certain conditions it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against the public policy for a contract of life insurance to stipulate that upon certain conditions or contingencies the policy should become void."

Northwestern Life Ins. Co. v. Hazelett, 105 Ind., 212, 215, 4 N. E., 582, 55 Am. Rep., 192; *Douglas v. Knickerbocker Life Ins. Co.,* 83 N. Y., 492.

There are no preponderating equities herein favoring the insured or her beneficiaries. There is no grasping corporation seeking to enrich itself at the expense of these appellees. It is charged by the beneficiaries, themselves, in their complaint that the appellant is a benevolent and fraternal benefit society and it is stipulated in the agreed statement of facts: "That the appellant corporation is a fraternal benefit society, not for profit."

We are unable to see wherein upholding the conditions upon which the membership of the insured was accepted contravenes any question of sound public policy, while, upon the other hand, we do see wherein it may eradicate from the minds of many morally weak beneficiaries temptations which might lead them on to murder.

The removal, by foul means, of those standing between anxious beneficiaries and property interests is quite prevalent. With the publicity of these dangers through many indictments and trials prevailing throughout the country, it is not strange that this society should seek to remove the temptation of anxious expectants to bring about premature deaths of the insured, and to press the counter suggestion that if beneficiaries in any manner whatever cause the death of insured persons the circle penalty shall be a loss of all claims to the benefits provided in the certificate.

Feeling that we must uphold the conditions in the certificate or policy or make a new contract for the parties, and believing that it does not contravene any principle of sound public policy, the judgment should be and is hereby reversed, with an instruction to the trial court to dismiss the same with costs.

CUNNINGHAM, C. J., not participating.

MORGAN, J., dissenting.

MORGAN, J., dissenting:

I think the judgment of the lower court should be affirmed.

The agreed statement of facts, given in full in the majority opinion, upon which the case was tried, discloses that the insured received from the defendant a certificate of insurance on her life, designating her husband as beneficiary. That while he was of insane mind he inflicted

wounds upon his wife that caused her death, and then took his own life, but as to which died first it is not definitely decided or stipulated. That plaintiffs are daughters and sole heirs of the insured, and sue by their guardian. That the defendant refused payment, under the terms of a printed provision on the back of the certificate, and contained, also, in the by-laws of the order, and made a part of the certificate pleaded in the defendant's answer, as follows:

"MURDERED BY BENEFICIARY. If any member shall be murdered by any beneficiary named in his or her certificate, or who may claim benefits thereunder, or should any beneficiary named in a member's certificate, or who may claim benefits thereunder, directly or indirectly, intentionally or accidentally, cause the death of any such member, then the right of any such beneficiary to receive any benefits under the certificate held by such member shall revert to the Grand Circle."

Now, in my opinion, it is not right, either from principle or authority, for the defendant to refuse to pay under this provision and under the agreed statement of facts. The defendant, in its answer, as a basis for its defense, after quoting the above provision from the by-laws, stated that the insured came to her death "as the result of wounds and injuries inflicted upon her by her husband with felonious and murderous intent, and that she was killed and murdered by her said husband." The answer shows the interpretation put upon the provision by the defendant. The title of the provision and the answer of the defendant indicate clearly that it was inserted in the certificate to prevent any recovery thereupon by anyone who should take the life of the insured with felonious intent or with any intention of obtaining the money to be paid under it. The provision is apt in its terms and sufficiently clear to prevent anyone from reaping any benefit by wrongfully taking the life of the insured. The bene-

ficent purposes of the order in insuring the lives of women will not permit any conception that the clause was inserted to deceive any of its members, and the large capitals entitling the by-law, "MURDERED BY BENEFICIARY," too plainly disclose an intention not to deceive. We are compelled to meet, however, the contention on this appeal that the words used: "Cause the death of the insured, directly or indirectly, intentionally or accidentally," were inserted under the above title for the purpose of defeating liability if the beneficiary should cause the death, even unintentionally, or while insane, and also regardless of the entire absence of any purpose in so doing to reap a reward for such an act. This requires an examination of the authorities upon the construction of such clauses. It is stipulated in the agreed statement of facts that the husband was insane when he inflicted the wounds that caused his wife's death, and then killed himself. Therefore, he was not guilty of murder, and could have had no purpose to obtain the money payable by the certificate, and consequently the aforesaid provision cannot be applied in this case. The heirs now claim the money, and they cannot, by any conceivable reason, be charged with having anything whatever to do with the death of the insured, but are wholly innocent in regard thereto; and it is so manifestly unjust that the purpose of the mother should be thwarted by a strict construction of this provision in favor of a forfeiture, that I cannot concur in the majority opinion.

The opinion in *Head Camp, Woodmen of the World, v. Irish,* 23 Colo. App., 85, 127 Pac., 918, 922, in regard to construction, generally, states:

"Mr. Niblack, in his work on Benefit Societies, on page 32, in regard to what construction should be given the by-laws of mutual benefit societies, says: 'The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent pur-

pose of their organization. Where there is any ambiguity or inconsistency in the terms of such by-laws, that construction should be given to them which is most favorable to the rights of the member.' And, again, on page 625, he says: 'In actions on certificates of membership issued by mutual benefit societies designed to secure the payment of money to those dependent upon their members, after the death of such members, courts should construe the rules and regulations of such societies liberally to effect the benevolent objects of their organization.' Mr. Bacon, in his work, in section 179, says: 'It is also a rule of construction that where the language used is ambiguous or inaccurate, and susceptible of two interpretations, it shall be construed most favorably to the promisee in the obligation.' And, again, in the same section, he says: 'It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee.' And, again, in the same section, he says: 'Contracts of insurance, because they have indemnity for their object, are to be construed liberally, so as to give them effect, if possible. If the policy contains two provisions, one favorable to the assured and one unfavorable, they being inconsistent and contradictory, that provision most favorable to the assured will be accepted and the other disregarded. Only a stern legal necessity will induce such a construction as will nullify the contract.'

"There are numerous decisions of this court and of our supreme court holding that, where an insurance policy is prepared by the party to be held liable under it, or where it contains doubtful provisions, or where a clause is susceptible of two constructions, that construction will be adopted which is most favorable to the insured.—*At-*

lantic Ins. Co. v. Manning, 3 Colo., 224; *State Ins. Co. v. Horner,* 14 Colo., 391, 23 Pac., 788; *German Ins. Co. v. Hayden,* 21 Colo., 127, 40 Pac., 453, 52 Am. St. Rep., 206; *Strauss v. Phenix Ins. Co.,* 9 Colo. App., 386, 48 Pac., 822; *Lampkin v. Travelers' Ins. Co.,* 11 Colo. App., 249, 52 Pac., 1040. And that certificates of insurance of benevolent associations should be interpreted the same as those of a mutual life insurance company.—*Chartrand v. Brace,* 16 Colo., 19, 26 Pac., 152, 12 L. R. A., 209, 25 Am. St. Rep., 235; *Sup. Lodge, Knights of Honor, v. Davis,* 26 Colo., 252, 58 Pac., 595. And that 'it is also an inflexible rule that a policy of insurance must be liberally construed in favor of the insured, so as not to defeat, without a clear necessity, the claim to indemnity which, in making the contract, it was his object to secure.'—*Northwestern Life Ins. Co. v. Tietze,* 16 Colo. App., 205, 210, 64 Pac., 773, 775."

Mr. Bacon, in his work on Benefit Societies, says, in sec. 329: "The question in all cases of this character is the proper interpretation of a contract, and the point of inquiry is, what obligations the parties must, from the language used, with relation to the subject-matter and the circumstances, be reasonably supposed to have intended to assume."

And, in the same section, the learned author, discussing a clause in a benefit certificate relieving the order from liability in case the insured should commit suicide, while sane or insane, says: "The clause against suicide is clearly intended to protect the insurance company against the fraudulent act of the insured, whereby he may, even at the sacrifice of his own life, secure a benefit to those whom he may desire to favor, at the expense of the insurance company. But, as has already been said, it has been held from the earliest days that a suicide committed in consequence of insanity was not within the meaning of the condition, although within its literal terms.

The decisions establishing this doctrine were placed upon the ground that the death, though apparently caused by the act of the party, was not so caused in contemplation of law, because his mind did not concur in the act, his mental organs having been so diseased as to cease to control his actions, or to guide them in accordance with reason."

It cannot be reasonably supposed that the parties to the contract intended that no recovery could be had by reason of anything done by the beneficiary while insane, as he could not be guilty of any fraudulent act, as Mr. Bacon says, "whereby he might, even at the sacrifice of his own life, secure a benefit to those whom he might desire to favor." If "suicide, committed in consequence of insanity, was not within the meaning of the condition" discussed by Mr. Bacon, then the killing of the insured, committed in consequence of insanity, was not within the meaning of the condition now under consideration. In the case of *Mutual Life Ins. Co. v. Terry,* 15 Wall., 580, 21 L. Ed., 236, the supreme court of the United States, distinguishing between suicide in the possession of ordinary reasoning faculties and suicide while insane, in reference to a clause in an insurance policy providing against liability in case the insured should "die by his own hand," after a full review of all the cases, said: "If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character or general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."—2 Bacon on Benefit Societies, sec. 331; *Clark v. Eq. L. A. Soc.,* 118 Fed., 374, 55 C. C. A., 200. Mr. Bacon further says, in the same sec-

tion, "A construction which punishes a person who is not in fault is not to be favored, if it can be allowed at all. The very object of life insurance is to provide for death by disease or in the ordinary course of nature. Death by his own hands, in the case of one *non compos,* is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical."

Now, if such construction is given in cases where it is provided that an insured cannot recover if he die by his own hand, and the same construction be applied to the facts of the pending case, then the clause now under consideration would not prevent a recovery, for the reason that whatever was done by the beneficiary was done while he was insane. And his acts while he was insane were not within the contemplation of the parties to the contract, and the insurer is liable. It seems that such construction would, for a much greater reason, apply to the facts of the pending case, as the contract here was made with regard to the acts of the beneficiary, and not in regard to the acts of the insured herself. In the absence of judicial construction of a clause like the one now under consideration, we are compelled to take the construction given by the courts concerning clauses in insurance contracts inserted to avoid liability in case of suicide by the insured. Mr. Bacon, in volume 2, sec. 336, in regard to clauses against suicide, says:

"To avoid the effect of these decisions it has become customary with life insurance companies to insert in their policies a stipulation that the contract shall be void if the insured shall 'die by suicide, felonious or otherwise, sane or insane,' or 'by suicide, sane or insane,' or 'die by his own act or hand, sane or insane.' These conditions have been generally upheld and successfully eliminate the element of suicide, so that no kind or degree of insanity will prevent the avoidance if the insured had the *intent* to do

the act, or realized the physical consequences of his act. This condition does not attach where there is an absence of intent, as in case of an accident. Culpable negligence, as in taking an overdose of laudanum to relieve pain, will not vitiate the contract. Where the condition was that the policy should be void if the insured should die by his own act or hand 'voluntary or otherwise,' the latter word was held too vague and uncertain to cover a case where the insured took his own life while insane. In a case in Ohio, where the policy was to be void if the insured 'shall under any circumstances die by his own hand,' the court held that the words 'under any circumstances' should be disregarded as too general and indefinite."

See, also, *Seitzinger v. Modern Woodmen of America,* 204 Ill., 58, 68 N. E., 478; *Schmidt v. Northern Life Assn.,* 112 Ia., 41, 83 N. W., 800, 51 L. R. A., 141, 84 Am. St., 323.

It is concluded, from the authorities and from principle, that the insurer in this case did not intend by the words used in the certificate that it could deny liability if the beneficiary, while he was insane, should cause the death of the insured. If such had been the intention, the words "sane or insane" would have been inserted after the word "accidentally." Furthermore, if the insurer had not intended that the provision should only apply to instances where the beneficiary, through a wrongful intent or felonious purpose, caused the death of the insured, it would not have entitled the clause "murdered by beneficiary." It would not have begun the clause with the provision as to murder, and it would not have associated the words "cause the death of the insured, directly or indirectly, intentionally or accidentally" with the title and the clause above referred to. The maxim *Noscitur a sociis* applies, and if the insurer did not intend that these words above quoted should imply a felonious intent, or at least a wrongful intent, they would not have been so associated. If the words referred to were intended to apply

to the act of an insane beneficiary, they were certainly unfortunately selected, as the acts of an insane person would hardly fall within the meaning of the words used.

Aside from the intention of the parties as the best rule for the construction of such contract, there are other rules of construction that would prevent the insurer from avoiding liability by reason of this clause in the contract. When applied to the acts of an insane beneficiary, these words become ambiguous and uncertain, and in such cases the courts have held that the benefit should not be forfeited, because forfeiture is an odious doctrine, as stated by Cunningham, J., in the case of *Knights of Maccabees v. Pelton,* 21 Colo. App., 185, 189, 121 Pac., 949. Ambiguous, indefinite and uncertain language should always be construed against the insurer, according to authorities heretofore cited. Again, if the insurer intended that the clause should apply to the act of an insane beneficiary, the selection of the word "cause" in the provision, where it is provided that if the beneficiary "cause the death of the insured," was unfortunate, for the reason that it readily occurs to the ordinary mind that an insane person could not, at least, directly, intentionally, indirectly or accidentally, *cause* anything. The parties to this contract must have intended that the provisions thereof, in reference to the acts of the beneficiary, referred to persons of sound mind, and if they did not so intend, it would have been stated in plain words that such was not the intention. A benevolent order such as this would not have permitted a clause to be shrouded in such indefinite and uncertain words as those used, especially in benefit certificates issued to a woman, in an order that was organized for the purpose of insuring the lives of women.—*Woodmen of the World v. Gilliland,* 11 Okla., 384, 67 Pac., 487. It is a surprise that the defendant permitted the basis of its defense as alleged in its answer to be abandoned in the briefs of counsel, and that it would attempt to defeat

the purposes of this certificate, by relying upon such a technical construction of this particular clause therein. The insurer well knew, from the multitude of decisions in reference to provisions against liability for acts of the insane, that unless some words like "sane or insane" were inserted, it would have little hope to avoid liability, but would invite litigation. The only conclusion is that it never intended, itself, to provide against the acts of an insane beneficiary. Policies of insurance and benefit certificates are prepared by persons skilled and experienced in such matters.

Furthermore, this clause is ambiguous and indefinite, in another particular: It is uncertain whether it was intended that the heirs could not recover if the beneficiary named in the certificate caused the death of the insured, or only in case they caused it themselves. The clause provides that—"should any beneficiary named in a member's certificate, or (any beneficiary) *who may claim benefits thereunder,* (though not named in the certificate) * * * cause the death of any such member, then the rights of any such beneficiary (who caused the death) * * * shall revert to the Grand Circle." Now, aside from the question as to who died first, the husband or the wife, no beneficiary's rights revert except the one who caused the death. Those who now claim the benefits never caused the death, and their rights do not revert. Furthermore, it is not stipulated nor agreed as to which died first, and if the husband died before the wounds produced the death of his wife, his rights as a beneficiary died with him, and the right of the heirs immediately took effect. As it was not stipulated nor proved that the wife died first, this defense must fail, because the burden of proof was upon the defendant to prove sufficient facts to establish the conditions of the forfeiture relied upon.—*German Am. Ins. Co. v. Hyman,* 42 Colo., 156, 172, 94 Pac., 27, 16 L. R. A. (N. S.), 77; *Loyal Mut. Co. v. Brown Co.,* 47 Colo., 467, 475, 107 Pac., 1098.

Certainly it could not have been the intention to impute the wrong of a "beneficiary named in the certificate" to those who "may claim benefits thereunder," and thus visit upon the innocent the sin of the guilty. And it would certainly be against public policy and common justice to permit the defendant to have the fund revert to it, and thus profit by the crime of the beneficiary named in the certificate, so long as these children live and claim it. If the beneficiary becomes ineligible, the heirs of the insured should have the fund.—*Schmidt v. Northern Life Assn.*, 112 Ia., 41, 83 N. W., 800, 84 Am. St. Rep., 323, 51 L. R. A., 141; *Doherty v. A. O. Hibernians, Etc.*, 176 Mass., 285, 57 N. E., 463; *Munroe v. Providence, Etc., Assn.*, 19 R. I., 363, 34 Atl., 149, 29 Cyc., 162.

As suggested in the majority opinion, it is a wise provision that prevents the intentional taking of the life of an insured, and "removes the temptation from anxious expectants to bring about premature deaths of the insured," but are those words in harmony with the conclusion reached? They are in perfect harmony with my conclusion, that the provision was inserted for this purpose only, "to remove the temptation from anxious expectants," but not to defeat a recovery, by innocent heirs, because of the irresponsible act of an insane beneficiary, who killed himself, thus annihilating any suspicion that he was an anxious expectant. The construction of this provision adopted by the majority opinion is disastrous in its effect. Under such construction, no recovery could be had by the heirs if a husband should attempt to catch a runaway horse carrying his wife to certain death, in case the horse should stumble over and kill the husband, and, falling, kill the wife; because, forsooth, the proviso says, if he "accidentally or indirectly cause the death," the fund reverts to the Grand Circle. Further illustrations are unnecessary. The provision destroys itself unless it is given a reasonable construction in harmony with the beneficent purposes of the order.

[No. 3868.]

ELLISON, ADMR., v. TUCKERMAN, RECEIVER, ET AL.

1. CHATTEL MORTGAGE—*Lien.* A chattel mortgage conforming to the statute and duly recorded, confers a lien paramount to any subsequent lien created by any contract of any kind to which the mortgagee is not a party.

2. —— *Duty of Mortgagee.* Mortgagee of chattels, who, being advised that a receiver has been appointed of the properties of the mortgagor, seasonably notifies him of the mortgage, and prohibits him from assuming possession of the chattels, or incurring any expense in relation thereto, is not required to take further action or make further inquiry. He is not responsible to one to whom the receiver afterwards entrusts the animals for maintenance.

3. —— *Extension—When Mortgagee Must Assume Possession.* Where a chattel mortgage is extended by proceeding in conformity with the statute, the mortgagee has, at the expiration of the period of extension, the same rights in respect to foreclosure, as at the original maturity of the debt, including a reasonable time in which to take possession of the chattels.

The mortgagee residing at a great distance from the place where the mortgaged animals were unlawfully detained, demanded possession thereof only four days after the lapse of the period of extension. Held in time.

Semble, that the statute granting thirty days to the mortgagee in which to assume possession of the chattels, has no application where the mortgage has been extended. The mortgagee must assume possession within a reasonable time after the expiration of the extension.

4. AGISTER—*Lien of.* The lien of an agister is purely statutory (Rev. Stat., sec. 4013) and is created only by contract express or implied with the owner of some interest in the live stock, and extends only to such interest. The lien created by a prior chattel mortgage is not subordinated to that of an agister who receives the animals without the knowledge and consent of the mortgagor, save, perhaps, in the case of some necessity or emergency calling for an exception to the rule.

The evidence held not to present such necessity or emergency.

5. STATUTES—*Construction.* A statute will not be so construed as to occasion injustice if it is susceptible of another interpretation.

6. CONSTITUTIONAL LAW—*Retrospective Statute.* A statute providing that "any chattel mortgage * * * which has been duly admitted to record * * * may be extended" by filing in the office where the

mortgage is of record a sworn statement of the mortgagee, showing the amount remaining due, and consenting to such extension (Rev. Stat., sec. 520) applies to mortgages already of record, as well as those subsequently executed.

7. JUDGMENT—*Upon Whom Binding.* An order of the district court appointing a receiver, and directing him to assume possession of certain live stock is without effect as against a mortgagee thereof who is not a party to the proceeding.

Error to Weld District Court. HON. HARRY P. GAMBLE, Judge.

Mr. H. E. CHURCHILL, for plaintiff in error.

Mr. ROBERT S. ELLISON, *pro se.*

Mr. CHARLES E. SOUTHARD, for defendant in error, Tuckerman.

Mr. H. N. HAYNES, for defendant in error, Day.

KING, J., delivered the opinion of the court.

The writ of error herein was issued to the district court of Weld county to review a judgment of said court rendered in favor of the defendants, in the sum of $792.40, upon the following facts:

April 10th, 1907, Joseph E. Painter purchased from S. D. McDaniel fifty-one head of thoroughbred Hereford cows with twenty calves by their sides, for the agreed price of $2,860, in payment of which he gave his two promissory notes, one for the sum of $2,800 payable in six months, and one for $60 payable in one year after date, and, to secure the same, gave his chattel mortgage upon all of said stock. The mortgage was duly recorded in Weld county, Colorado, April 12th, 1907. September of that year McDaniel died, and plaintiff Ellison, a resident of Colorado Springs, El Paso county, was, by the county court of that county, appointed administrator of the estate. Prior to maturity, payments were made on the notes, reducing the principal to about $2,200. At the

maturity of the last note the administrator extended said chattel mortgage until and including the 15th day of February, 1909, by sworn statement filed in Weld county, in conformity with the statute. July 6th, 1908, in a suit pending in the district court of Weld county between said Painter and one Wilcox as partners, in which Wilcox sued his partner Painter for an accounting of partnership matters, and in which the stock mentioned was claimed to be partnership property, defendant, Tuckerman, was appointed receiver, and, by the court, directed to take possession of this and other stock, as receiver, and to feed and care for the same, and also directed to notify the mortgagees of such order. About July 11th the receiver sent written notice of this order to the plaintiff at Colorado Springs, and on the 15th plaintiff answered, notifying the receiver of his mortgage, and further warning him not to interfere with the stock or incur any expense with respect thereto. This notice was received by Tuckerman in due course of mail, but in the meantime, and on the 13th of July, he had taken possession of the stock and placed it in a pasture belonging to the defendant Day, under a contract to pasture the same for an agreed price. Day knew of the chattel mortgage, had read it, discussed it, and took the stock with such knowledge, after assurance from the receiver that he would be paid. Most of the stock was retained by Day until taken from him under writ of replevin, as hereinafter stated; the rest was kept by the receiver. Plaintiff was not notified that the receiver had taken possession of the stock until he attempted to foreclose the mortgage. On February 19th, four days after the date to which the mortgage was extended, the administrator demanded possession of the cattle, but such possession was refused by the defendants except upon condition that they be paid for pasturage and feeding, approximating the amount of the judgment. By permission of the district court plaintiff brought re-

plevin against the receiver and Day for possession of the stock, or its value, and, under proper writ, took the stock, and thereafter sold it under the terms of the chattel mortgage for an amount less than the mortgage debt. At the time the stock was taken by the receiver it was in the possession of Painter, upon a ranch which belonged to him, or to the co-partnership, and was removed to another pasture because it was better.

Plaintiff in error contends that his mortgage was a first and prior lien; that he had a reasonable time after maturity of the mortgage as extended in which to take possession, particularly in view of the fact that defendants had actual notice of his lien when they received the stock. He also contends that under the statute he had thirty days after maturity of said mortgage as extended in which to take possession, and that thirty days is a reasonable time. Defendants in error contend that the 15th day of February, the day fixed as the date to which the extension of the lien was limited, marked the life of the lien, and that no time thereafter is allowed in which to take possession; and, further, that the agister's lien, under the circumstances, was never subordinate to that of the chattel mortgage, but was always a prior lien, and further assert equities in their favor. The attorney for the defendant Tuckerman also makes the contention that the consent of the mortgagee for the defendants to feed the stock is implied from the facts in evidence; that the extension of the mortgage was illegal and of no effect, because the present law permitting extension by affidavit did not go into effect until after the execution and delivery of the chattel mortgage.

1. By virtue of the contractual provisions contained in the chattel mortgage, together with the provisions of the statute permitting the mortgagor to retain possession of the mortgaged chattels until maturity of the mortgage, in case a stipulation to that effect is incorporated in the

mortgage and that instrument duly acknowledged and recorded, a lien, both contractual and statutory, is created, which is and remains prior and paramount to any subsequent lien created by contract of any kind to which the mortgagee is not a party or to which he does not give consent, actual or implied. The mortgagor alone cannot bind the property nor make it liable for liens for any purpose except as to his equity or interest therein in excess of the mortgage debt.

2. The agister's lien, the benefit of which is claimed by the defendants, is purely a statutory lien; it did not exist at common law. But we think it does not attach in the absence of relations or arrangements which amount to a contract, express or implied, between the agister and the owner of the property or of some interest therein, and then only to the extent of the interest of the person by whom the property is "entrusted" to the keeping of the agister.—*Auld v. Travis*, 5 Colo. App., 535, 541, 39 Pac., 357; *Hammond v. Danielson*, 126 Mass., 294. Upon the question as to whether an agister's statutory lien is superior to a prior chattel mortgage lien, there is conflict of opinion, and courts of high repute have reached diverse conclusions. But we think the better rule is that the holder of a valid chattel mortgage, duly acknowledged and recorded, cannot be divested of his lien or subordinated therein to the claim or lien of an agister who takes the property at the instance or request of a mortgagor, or any other person, without the knowledge and consent of the mortgagee, except, perhaps, in case of necessity or some emergency taking it out of the rule, which does not here exist. We are satisfied with the reasoning and adopt the rule of the courts as found in the following decisions: *Sargent v. Usher*, 55 N. H., 287, 20 Am. Rep., 208; *Charles v. Neigelsen*, 15 Ill. App., 17; *McGhee v. Edwards*, 87 Tenn., 506, 11 S. W., 316, 3 L. R. A., 654; *Hanch v. Ripley*, 127 Ind., 151, 26 N. E., 70, 11 L. R. A., 61; *Everett*

v. Barse Live Stock Comm. Co., 115 Mo. App., 482, 88 S. W., 165; *National Bank v. Jones*, 18 Okla., 555, 91 Pac., 191, 12 L. R. A., 310, 11 Ann. Cas., 1041; *Wall et al. v. Garrison et al.*, 11 Colo., 515, 19 Pac., 469. Numerous cases in support of this view are collated in a case note to *National Bank v. Jones, supra,* in addition to which we cite 1 Jones on Liens, sec. 691; 19 Am. & Eng. Enc. of Law (2nd ed.), p. 438. Counsel for defendants frankly admit that such is the majority rule in the courts of the United States, but insist upon the exceptions to that rule, and the benefit of the particular conditions found in the instant case. *Case v. Allen,* 21 Kan., 217, 36 Am. Rep., 425, and *Smith v. Stevens,* 36 Minn., 303, 31 N. W., 55, cited and relied on by defendants, were cases in which an agister's lien was held superior to a prior recorded mortgage lien, but the reasoning does not change nor shake our conviction that the other is the sounder and the better rule. As was well said by Berkshire, J., in *Hanch v. Ripley, supra,* in construing the statute of Indiana, "The language employed in the statute is general in its character. It does not seem to have been the intention of the legislature to do more than to create a lien in favor of the classes of persons named; and, not having expressed any intention of giving to these persons superiority over other lienholders, we think it is but fair to presume that it was the intention of the legislature to place them on a common plane with other lienholders, the first in the order of time having superiority. As the agister's lien depends alone upon the statute it can have no greater force than the statute gives it; and, as the legislature have, as we have said, manifested no intention of giving to it superiority over other liens, it can have none." If the legislature, in passing the lien law now under consideration, intended to give superiority to the subsequent agister's lien, we would be disposed to accept the view taken by the supreme court of New Hampshire in *Sargent v. Usher, supra,*

quoted with approval in *Charles v. Heigelsen, supra,* as follows: "The idea that a lien may be created by a contract of the possessor of animals for their keeping, the owner being in no way privy to such contract, when no rights whatever, as against the owner, could be conferred or created by a contract of sale, seems anomalous, to say the least. Such a thing would, as it seems to me, be a violation of the fundamental rights of property guaranteed by the constitution; and, if the legislature had undertaken by this act to create a lien, to arise on such a state of facts, I think it would be the duty of the court to hold the act, so far, unconstitutional and void. But I do not think any such intention is to be found in the statute. In giving this specific lien, I think the legislature used the word in its legal and generally accepted sense, and that implies some privity between the owner, or person having the right of disposing of the goods, and him in whose favor the lien is claimed; and that by 'entrusted' is meant entrusted by the owner or other person having authority to pledge the animals for such a purpose, that is, to suspend the owner's right of possession until the charges are paid." In *McGhee v. Edwards, supra,* it is said in substance that to permit the mortgagor to encumber the property to its full value, and consequent destruction to the mortgagee, is as fatal to the latter's rights, and defeats as effectually the policy of our registration laws, as if the mortgagor were allowed to sell the property to a purchaser who was in fact ignorant of the mortgage, and thus defeat the lien of the mortgagee.

The language above quoted so aptly applies to this case that little more need be said. We shall not assume that our legislature intended such unjust and inequitable, if not unconstitutional, results as would follow from the interpretation sought to be put upon our statute, so long as it is susceptible of the interpretation which we have given it. As to the defendants, the lien which they ac-

quired attached only to such rights and interest as belonged to the mortgagor, Painter, or the co-partners, at the instance of whom the property was seized and cared for by the defendants.

3. By reason of the express notice given by the mortgagee herein to the defendants, warning them not to incur any expense on account of the mortgaged stock, his consent thereto cannot be implied. This conclusion is strengthened and fortified by the further fact that plaintiff had no knowledge or notice that, notwithstanding his warning, defendants had taken possession of, or were feeding the stock. He was under no obligation, legal or equitable, after such warning, to make further inquiry.

4. It is contended by defendants that under the act permitting extension of chattel mortgages by affidavit of the mortgagee (sec. 520, Rev. Stats. '08), the rights of junior lienors attach *eo instante* of the expiration of the time mentioned in the affidavit or sworn statement. With this contention we do not agree. The act of April 9th, 1907, Session Laws, '07, p. 258, Rev. Stats., '08, sec. 520, provides that the lien of a recorded chattel mortgage may, within thirty days after the maturity of the debt secured thereby, be extended by the mortgagee by filing a sworn statement showing certain matters including the period during which he consents to extend the mortgage, "and thereupon the lien of the mortgage shall be extended for such designated period. At the expiration of said extended period said mortgage, and the lien thereof, may be again extended for another period, not exceeding two years, with like effect," and in the same manner, until the indebtedness secured shall have been paid, or barred by the statute of limitations. We think this statute, reasonably construed, means that upon compliance with its requirements, the maturity of the mortgage is extended from the date given therein as the maturity of the debt to the end of the extended period, and that thereupon, in

foreclosing his security, the mortgagee has all the rights theretofore recognized upon foreclosure at maturity of the debt, including a *reasonable* time in which to take or demand possession, but excepting, perhaps, the statutory right to thirty days after maturity within which to take possession of the chattels.—Rev. Stats., '08, sec. 518. This provision seems to be limited to thirty days after maturity of the debt, and it is plain that the extension of the mortgage by this method does not affect the maturity of the debt. Some act on the part of the mortgagor would be necessary to extend the debt, and thus affect the running of the statute of limitations. But it is not necessary to rely upon this provision of the statute. The right to a reasonable time after maturity of the mortgage within which to take possession has always been recognized by the courts of this state.—*Stanley v. Coal Co.,* 24 Colo., 103, 49 Pac., 35; *Cassell v. Deisher,* 39 Colo., 367, 372, 89 Pac., 773; *Bradford v. Roberts,* 46 Colo., 330, 104 Pac., 391; *Babbitt v. Bank,* 50 Colo., 258, 108 Pac., 1003. Since the adoption of section 518, and because of it, thirty days after maturity of the debt have been regarded as constituting a reasonable time in which to act. Prior thereto the time varied from a few days to several weeks, according to circumstances. In this case the mortgagee resided a long distance from the place where the cattle were kept. He had no knowledge of any exigency demanding unusual diligence. He acted in perfectly good faith. The situation of defendants was not changed nor their interests prejudiced by the delay. Therefore, the demand for possession made by plaintiff February 19th (only four days after maturity of the mortgage as extended), upon defendants, who at the time of such maturity were, and for a long time prior thereto had been, wrongfully in possession of the chattels, as against the plaintiff, mortgagee, if necessary at all, was manifestly made within a reasonable time and preserved the rights of the plaintiff. In so far

as this view conflicts with *Rosenbaum Bros. & Co. v. Ryan Bros. Co.*, 33 Mont., 424, 84 Pac., 1120, we are not in accord with that decision.

5. The specific provision of the statute relied on, providing for an extension of chattel mortgage liens by filing a sworn statement, was passed April 9th, 1907, and took effect ninety days thereafter, subsequent to the execution, delivery and recording of the chattel mortgage, but before the extension was made. It is purely a remedial statute amendatory of an act theretofore existing, and applied to mortgages in force at the time it became effective as well as to those subsequently executed, and is not obnoxious to the constitutional inhibition against retrospective legislation.—*Aultman & Taylor Machinery Co. v. Fish et al.*, 120 Ill. App., 314.

Defendants make a strong appeal to the equities alleged to exist in their favor under the facts of the case. This is not a case of equitable cognizance. Plaintiff may well stand upon his strict legal rights. However, we think the equities are with the plaintiff. Defendant Day, who holds the larger part of the claim for feed and pasturage, knew of the mortgage, read and discussed it before accepting the stock, and after assurance by his co-defendant that he would be paid. Fair warning had been given by the plaintiff. The order of the court directing the receiver to take charge of and feed the stock as partnership property affords no protection to the defendant against the plaintiff in this case. Plaintiff was not a party to that proceeding, and it may well be assumed that both the court and the defendants intended and expected that the charge or cost of pasturage should be a charge upon the partnership, or the mortgagor, and a lien upon the equity only in the stock over and above the mortgage, whether that equity belonged to the mortgagor or to the partnership. Furthermore, there is nothing in the evidence which plainly shows, or from which a strong infer-

ence can be drawn, that the mortgagor would not have cared for and fed the stock, as he was under obligations to do by virtue of his relation to the property, as well as by the terms of the mortgage. The element of necessity, or emergency, on the part of the claimants of the agister's lien, for feeding the stock in order to save or preserve it, is not shown to have existed to the extent that a lien should be given therefor superior to that of the plaintiff. The evidence shows that a charge amounting to more than one-third the value of the stock was made against it without a vestige of authority, actual or implied, from the mortgagee. To permit this to be done would concede the right of confiscation by virtue of the statute.

By a late decision of the supreme court, *Rohrer v. Ross,* 53 Colo., 328, 125 Pac., 489, which the diligence of counsel did not disclose, and which has come to our attention since writing the foregoing opinion, the law upon the question of priority, as between the lien claimants herein, is settled, and the views hereinbefore expressed are in harmony therewith.

The judgment is reversed and the cause remanded with instructions to the trial court to enter judgment in favor of the plaintiff.

Reversed and Remanded.

KING, J., on petition for rehearing:

Moved thereto by the earnest request of the learned counsel for the defendant in error Day, and by his able argument in support of the petition for rehearing, we have endeavored to give the record "critical and unbiased reconsideration," the result of which is hereinafter expressed. We used the phrase "after the maturity of the mortgage as extended" advisedly, and not through inadvertence, believing that, by applying the rule of construction that all parts of a statute should be given force and effect rather than that any part thereof should per-

ish (even upon a strict construction as insisted upon by counsel), the statute in question clearly contemplates something more than a mere extension of the time during which the mortgagee must, after maturity of the debt, take possession in order to preserve his priority of lien and right. The statute provides for an extension of the mortgage and its lien by the act of the mortgagee, and upon compliance with its terms the maturity of the mortgage, which was theretofore identical with the maturity of the debt, is moved forward to the last moment of the extended period, during which time the mortgagor is entitled to possession of the chattels and exemption from their seizure to the same extent as under the original terms of the mortgage, notwithstanding default in payment of the debt at maturity. By virtue of such extension, and the terms of the statute, such default is lawfully waived for the full extended period, and the mortgage continued, unabated in force and unimpaired as to the remedies afforded the mortgagee, including a reasonable time after such maturity in which to take possession. In other words, by the act of the mortgagee, default as to the mortgage was prevented. Availing himself of the provisions of the statute, he extended the mortgage precisely as he might, with the consent of the maker, have extended the note which it was given to secure.

Neither in the case of *Rosenbaum Bros. & Co. v. Ryan Bros. & Co.*, 33 Mont., 424, 84 Pac., 1120, nor, do we think, in any of the many cases cited by counsel, is there any holding upon similar facts contrary to the views herein expressed. The question of an attempt, in those cases, to foreclose the mortgage by taking possession *within a reasonable time,* after expiration of the period of extension, was not in issue. After extension the mortgagee is not, as we have said, compelled and should not attempt to take possession within the period of extension, unless for some cause other than maturity of the debt or expira-

tion of the time for which the mortgage was originally given. He therefore has an *appreciable* time in which to take possession. In this respect there is no difference between the expiration of the lien of the mortgage in the first instance by maturity of the debt, and the expiration of the lien and mortgage, as extended, by virtue of the lapse of time specified. The *appreciable* time given in which to foreclose is, in either case, *a reasonable time.* And the argument advanced, and every authority cited in support thereof by counsel for defendant in error, would be just as persuasive, but not more so, were we considering now for the first time whether, without a statute giving time for taking possession after the expiration of the mortgage, any time should be allowed a mortgagee. It is conceded that our supreme court, before the enactment of the thirty-day statute, uniformly held that a reasonable time should be allowed the mortgagee after expiration of the mortgage in which to take possession. Precisely the same reasons exist for allowing a mortgagee a reasonable time within which to take possession after expiration of the period to which the mortgage has been extended.

Counsel objects because no demand for possession was shown to have been made upon the defendant, Day, prior to suit. But Day was the agister for Tuckerman as receiver, and, if any demand was in fact required, demand upon and notice to Tuckerman was sufficient, there being no privity between the mortgagee and Day. However, we think a demand was not a necessary condition precedent to plaintiff's right to replevy the stock, except so far as it may have been necessary in order to obtain permission of the court to sue its receiver. Under the circumstances we think that, as to this plaintiff, both Tuckerman and Day were trespassers *ab initio*. With actual knowledge as well as constructive notice of plaintiff's rights as mortgagee they took possession of the stock before maturity of the mortgage and at all times

thereafter held it, in hostility to the rights of the mortgagee, under a claim of prior lien created by order of the court. Such taking was, as to the mortgagee, a conversion, and, therefore, they could thereafter neither have a lien on the stock for feeding nor insist upon demand for possession as a condition precedent to the right of the mortgagee to maintain his suit. They were not, as to him, subsequent lienees in good faith under our statutes.—*Howard v. Bank,* 44 Kan., 549, 24 Pac., 983; *Howard v. Burns,* 44 Kan., 543, 24 Pac., 981; *Gregory v. Thomas,* 20 Wend., 17; *Newman v. Tymeson,* 12 Wis., 448; *Beh v. Moore,* 124 Ia., 564, 100 N. W., 502; *Harding & Co. v. Kelso,* 91 Mo. App., 607, 609; *Lowe v. Wing,* 56 Wis., 31, 13 N. W., 892; *Corbin v. Kincaid,* 33 Kan., 649, 7 Pac., 145. These cases hold that a junior mortgagee, and, as well, a person claiming under a junior lien for agistment, who takes possession of mortgaged goods prior to the maturity of the senior mortgage, and with full knowledge thereof and in hostility thereto, cannot be heard to insist that the senior mortgagee must take, or attempt to take, possession of the goods in order to protect such senior mortgagee's prior lien; and, further, that a demand is not necessary to entitle such mortgagee to maintain his action in replevin or for conversion. The same rule is recognized and applied in *Bradford v. Roberts,* 46 Colo., 330, 104 Pac., 391, as to an attachment creditor. Moreover, demand need not be shown where the defendant subsequently contests the action on its merits, or where it otherwise appears that a demand, if made, would have been unavailing.

The decision of our supreme court in *Rohrer v. Ross,* 53 Colo., 328, 125 Pac., 489, has not been unduly extended to the facts in this case, as it has only been given force as decisive of the seniority of a chattel mortgage lien over that of an agister acquired during the life of the mortgage.

We may concede the claim of counsel that the estate of the deceased mortgagee received substantial benefit from the excellent care given the stock by the defendant, Day; and, notwithstanding the fact that his care was purely voluntary, so far as the administrator was concerned, there may be reason for considering the question of his claim for compensation. But that is a matter which should be presented to the court having jurisdiction of the administration, and cannot be determined in this proceeding. It does not necessarily follow that, because Day may not recover at all from the mortgagee (if the probate court should so decide), he is without a remedy against Tuckerman, the receiver, or the mortgagor. The petition for a rehearing is denied.

Decided April 14, A. D. 1913. Rehearing denied June 10, A. D. 1913.

[No. 3638.]

SHWAYDER ET AL. v. CLAY.

VERDICT—*Construed.* Defendants gave bond to plaintiff conditioned that the principal therein should return to the registry of the court whereof plaintiff was clerk so much of $1,000, received by him, as, in a cause to be afterwards instituted, it might be determined that he was not entitled to retain as his fee as an attorney in a certain cause theretofore depending. The action being afterwards instituted, the jury rendered a verdict in favor of the attorney, in the sum of $200.00. These facts appearing by the answer in an action upon the bond, *held*, that the plaintiff was entitled to judgment on the pleadings; that the verdict imported that the entire fee to which the attorney was entitled was $200.00, and not that sum in addition to the $1,000; that the answer presented no issue of fact.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Messrs. SOLOMON SHWAYDER, PHILIP HORNBEIN, L. M. GODDARD and HUGH MCLEAN, for appellants.

Mr. CHARLES H. TALBOT, and Mr. MILTON J. HELMICK, for appellee.

BELL, J.

This controversy grows out of certain proceedings in the divorce suit of Carrie O'Donnell v. Michael O'Donnell, commenced in the district court of the city and county of Denver in the year 1906. Solomon Shwayder, one of the appellants herein, was the attorney for Carrie O'Donnell in said divorce suit, and, as such, secured a temporary injunction restraining Michael O'Donnell from transferring his property *pendente lite.* Subsequently the O'Donnells settled their dispute out of court, and, after taking evidence, the court entered an order fixing the amount of counsel fees due the appellant Solomon Shwayder for the services rendered by him to Carrie O'Donnell in said divorce suit. Later the court vacated its order in this respect, and directed the appellant Shwayder to institute proceedings in said district court for the purpose of determining the proper compensation for his services, and of enforcing his lien therefor against the sum of $1,000 which he held, and which had previous to his possession thereof been placed by Michael O'Donnell, as a result of the divorce proceedings, in the custody of Otis B. Spencer, predecessor in office of the appellee, as registrar of said court. In pursuance of an order of court, the appellant Shwayder was directed to return to the registry of said court said sum of $1,000 within thirty days from the 10th day of November, 1906, or to give a good and sufficient bond, with sureties thereon, conditioned that he would return to the registry of said court said sum of $1,000, or so much thereof as might be determined he was not entitled to retain as compensation for his services aforesaid, the value of which services was to

be determined in a proper civil proceeding which he was directed to institute in said district court within ten days from the 10th day of December, 1906. On or about the 10th day of November, 1906, the appellants herein, for the purpose of allowing said Shwayder to retain said sum of $1,000, pending the determination of the value of his said services as provided in said order of court, and in compliance with the terms of said order, did execute and deliver to the appellee's predecessor as aforesaid their bond in the sum of $1,500 with Solomon Shwayder as principal, and David Schwartz and Harry Schwartz as sureties. Said bond provided that Solomon Shwayder might retain said sum of $1,000 pending the final determination of a certain proceeding to be brought by him in said court for the purpose of establishing the value of his services as aforesaid, and of enforcing his lien therefor, and that he should return to the registry of said court the said sum of $1,000, or so much thereof as might be determined in said proceeding he was not entitled to retain as compensation for his said services. On or about the 18th day of December, 1906, said Shwayder, in compliance with said order of court and the conditions of his bond, brought an action in the district court against Carrie O'Donnell and Michael O'Donnell to establish the full value of his services rendered to Carrie O'Donnell, as aforesaid, and to enforce his lien therefor, and on or about the 13th day of October, 1908, the value of said services was tried to a jury, which rendered a verdict in favor of said Shwayder in the sum of $200, and upon which verdict the court rendered and had judgment entered. Subsequently the appellee herein brought the action now before us to recover the sum of $800, the balance of $1,000 held by Shwayder after deducting therefrom the amount of his $200 judgment, setting up the bond in *haec verba*, its breach, and the resultant indebtedness of $800 accruing to the appellee thereon. The appellants,

after preliminary proceedings by way of demurrers, filed their answer admitting the capacity of the appellee, the proceeding in said divorce case, the issuing of said injunction, the settlement between the O'Donnells, the discontinuance of the divorce suit, the dissolution of the injunction, and the execution and delivery of the bond sued upon, but deny the power of the court to require such a bond. They also admit that suit was brought by appellant Shwayder in the district court against the O'Donnells to recover the full value of his services rendered in said divorce suit, and to enforce his attorney's lien therefor, and further admit the verdict and judgment therein in the sum of $200, and their refusal to pay the sum of $800 demanded, or any part thereof, claiming that Shwayder is entitled to the whole sum of $1,000 mentioned in the bond, in addition to the sum of $200, the amount of the judgment. Much of the answer filed as aforesaid was stricken out, and the appellants, in open court, elected to and did stand upon their answer as reduced, whereupon the appellee asked for judgment on the pleadings, which was rendered by the court in the sum of $784 and costs to be taxed, from which judgment the appellants appealed.

Counsel for appellants abandon all assignments of error, except numbers 6 and 7, wherein they complain of the action of the court in rendering and entering judgment on the pleadings. Counsel's contentions are that the pleadings raised a triable issue as to whether the verdict of the jury for $200 in favor of Shwayder embraced his entire compensation, or whether it was the intention of the jury to permit him to retain the sum of $1,000 mentioned in the bond, and award him an additional sum of $200, the amount mentioned in its verdict, making an aggregate compensation to the appellant Shwayder of $1,200 for the services rendered by him in said divorce suit.

We are in complete unison with the contention of counsel for appellants that judgments upon the pleadings

should be restricted. However, where the answer largely controverts conclusions of law, as it does in this case, and under the general condition of the pleadings before us, we think an uncontroverted cause of action is stated in the complaint, and that such a judgment was proper. We also think that it is almost self-evident from the record before us that it was understood by the court and jury at the trial of the Shwayder-O'Donnell case that Shwayder's entire compensation for his services in the O'Donnell divorce suit was being submitted, and was determined to be in the sum of $200, and the court was justified in the case before us in rendering judgment for the appellee herein in the sum of $784 and costs; hence, we think the judgment should be and it is hereby affirmed, with costs.

Decided June 10, A. D. 1913. Rehearing denied July 14, A. D. 1913.

[No. 3647.]

DEL MONTE LIVE STOCK CO. ET AL. v. THE BOARD OF COUNTY COMMISSIONERS OF CHAFFEE COUNTY.

1. APPEALS—*Practice—Injunction.* Where, upon a sufficient bill, application is made in the district court for injunction, and is refused, such application may be renewed and the injunction allowed in the court of review.

The supreme court may, under the statute (Mills' Code, sec. 398, Rev. Code, sec. 433, Laws 1911, c. 6, sec. 18), award final judgment. Additional averments or evidence are not to be introduced.

2. INJUNCTION—*Proceeding to Open Public Road.* Where an attempt is made to open a public road through private property, without substantial compliance with the requirements of the statute, without affording the property owner opportunity to be heard, and without compensation made or offered, for the injury occasioned, an injunction will be awarded.

3. —— *Irreparable Injury,* does not necessarily import an injury of such character as to be beyond the possibility of compensation in damages, or even that it must be very great. That no damage in fact can

be proven often furnishes the very best reason why equity should interfere, *e. g.*, where the injury complained of is a continuous one.

4. —— *Obstruction of Private Way.* An injunction allowed to restrain the opening of a public road, without compliance with the requirements of the statute, where the effect was to obstruct a private lane by which the live stock of complainant had long been wont to go to the watering place.

5. PARTIES—*Defect in—Misnomer—Waiver.* A defect of parties must be raised by demurrer or answer; otherwise the objection is waived. Three persons were named as defendants, with the addition "the board of county commissioners" of a county named. Throughout the proceedings in the court below all parties treated the board of county commissioners as the defendant. *Held* that the county commissioners were bound by the proceeding, and by any order or decree that might be properly made in the court of review.

Appeal from Chaffee District Court. HON. LEE CHAMPION, Judge.

MESSRS. WILLIAM B. TEBBETTS, HERBERT M. MUNROE and GEORGE D. WILLIAMS, for appellants.

Mr. WALLACE SCHOOLFIELD, for appellees.

BELL, J.

This action comes before us on an appeal from an order and judgment made by the district court of Chaffee county, Colorado, denying the right of the appellants to a perpetual injunction and dismissing the action. The complaint alleges, among many other things, that on or about the 3rd day of March, 1908, a petition was presented to the appellees, as county commissioners of the county of Chaffee, praying that a county road be laid out and established along a certain course or route, therein described, which ran through certain lands and premises of the appellants; and on or about the 6th day of April, 1908, the appellees, at a special meeting, entered, on said petition, an order appointing road viewers, and did appoint road viewers, to view the road described in said petition, and directed said viewers to meet at 10 o'clock

a. m. of May 9th, 1908, and to mark out said road, to assess the benefits and damages accruing to all persons affected by reason of the laying out of same, to award damages to all persons, in excess of the benefits accruing to him or them, a sum equal to such excess, and to report to the appellees their acts and doings in the premises; that on or about the 15th day of May, 1908, after having met and viewed said proposed road, the viewers filed in the office of the county clerk and recorder of said county a report in writing of their view, and recommended that said road run along a certain course or route mentioned and described in said report; that prior to the first Monday of July, 1908, which was the date of the next regular meeting of said board of county commissioners, the appellants conferred with the various members of said board and protested to the individual members thereof against the opening of said proposed road, and was assured and advised by said individual members that no further action would be taken in the matter; that, however, on the first Monday of April, 1909, appellees, without notice to the appellants or either of them, acted favorably on the proposed road, as far as reported upon, but authorized and directed said viewers to complete their view of said road and make further report thereon with all convenient speed; that on or about the 30th day of August, 1909, said viewers filed an additional and amended report, recommending the establishment of a road along a course or route mentioned and described in said amended report, which report was approved by the appellees on the 7th day of September, 1909, and said road ordered opened as a public road or highway of said county, and, in compliance with said order, notices were posted in three public places that said road would be opened for public use from and after sixty days from the date of said notice; that the road recommended in the amended report was wholly different from that mentioned and described in the petition,

and also from that recommended in the original report of the viewers; that the opening of said new proposed road would embrace a large amount of land owned by the appellants; that the amended and additional report of said viewers does not show that said viewers viewed the property of the appellants, or either of them, over and across which said new proposed road runs; that said viewers in making said report did not allow any damages whatever to said appellants or either of them for the land proposed to be taken, and the report so made does not show that the rights of said appellants or either of them were considered, or that the damages or benefits accruing to them or either of them were in any manner assessed or determined; that said appellants had no actual notice of the action of said commissioners or of said viewers in their efforts or proceedings to take, condemn or appropriate the lands of the appellants or either of them for the purpose of establishing said proposed road, and have never been given an opportunity to be heard respecting the damages that might be sustained by them in the opening of said road; that, notwithstanding the order of said commissioners made on or about the 7th day of September, 1909, no further action has been taken to this date, January 25th, 1910, by said commissioners, or others, toward the opening of said proposed new road, but the appellants are informed and believe that the appellees are contemplating such opening during the month of February, 1910, and will so open it if not enjoined by the court; that great and irreparable injury would be done to the appellants if said road was opened, and they, therefore, prayed the order and decree of the court perpetually enjoining and restraining said appellees, and their successors in office, from opening and establishing the public highway provided for in the order of the commissioners made on September 7th, 1909. The complaint was filed February 11th, 1910. On the 2nd of April, 1910, the appellants made an

application for a temporary injunction, which was resisted by the appellees, and upon that day the court denied the temporary injunction, and held that the only relief sought in the action was a perpetual injunction and, therefore, dismissed the action; to which ruling the appellants excepted and took an appeal to the supreme court. The appellants applied to the district court for a temporary injunction pending the appeal, which was also denied; and, on May 2nd, 1910, filed their petition in the supreme court for a temporary injunction and general relief. On May 3rd, 1910, the supreme court issued a temporary injunction, and further ordered that the appellees, on the 23rd day of May, 1910, at 10 o'clock a. m., show cause, if any they had, why an order of said court should not be made permanently restraining and enjoining the appellees from doing the things temporarily restrained as aforesaid. On June 6th, 1910, appellees filed an answer in the supreme court, and divers affidavits in support thereof, all of which were, on November 10th, 1910, stricken from the files because said answer raised issues of fact which were not raised in the district court. On June 24th, 1910, appellants moved for a permanent injunction in accordance with the prayer of their petition. On July 2nd and August 27th, 1910, appellees filed a brief and reply brief, which are confined largely to matters raised in the answer and affidavits in support thereof, which, since their filing, have been stricken from the record, and thus leaves the matters stated in the complaint as confessed. That part of appellees' brief which is pertinent to the record, as we are to consider it, charges that the complaint is without equity, and does not state facts sufficient to constitute a cause of action; that the supreme court has no jurisdiction of the cause; and that there is no defendant herein against whom a writ might issue.

We think the complaint, taken as confessed, states a cause of action, and the chief justice of the supreme court

must have so thought when the temporary injunction was issued and when the order was made requiring the appellees to show cause why the writ should not be made permanent.

"Where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation."—Lewis on Eminent Domain, 2nd vol., 2nd ed., page 1356, sec. 632; *Browning v. Camden & Amboy R. R. Co.*, 4 N. J. Eq., 47-57; *Bass v. Metropolitan Co.*, 82 Fed., 857, 27 C. C. A., 147, 39 L. R. A., 711.

Counsel for appellees vigorously urges that both the statutory and general remedy for damages are open to appellants, and that no great or irreparable injury will be done if the writ is denied.

In addition to taking the land, apparently without due process of law, the complaint shows that the appellants are engaged in the cattle business, and use the premises crossed by the proposed road for pasturing cattle; and have a private lane or roadway connecting said premises with the South Arkansas river as the only source of water supply for said cattle at certain seasons of the year, and if said road should be laid out as ordered by the appellees, it would deprive the Del Monte Live Stock Company, one of said appellants, of the use and benefit of said private lane for the purpose for which it was purchased by said company, and for the purpose for which it had been continuously used by said company since the year 1885.

In Elliott on Roads and Streets, 2nd ed., page 714, sec. 665, it is held that:

"It (irreparable injury) does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proven, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one."

This proposition is also supported in *Newell et al. v. Sass,* 142 Ill., 116, 31 N. E., 176, which further holds:

"That an injunction will lie to prevent obstruction to a private way on the ground that the party has no adequate remedy at law."

See also *McCann et al. v. Day,* 57 Ill., 101.

In Lewis on Eminent Domain, 2nd ed., 2nd vol., page 1351, sec. 631, it is stated that:

"It is said to be almost universally held that an entry upon private property under the color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the laws."

Chicago & Atchison Bridge Co. v. Pacific Mutual Tel. Co., 36 Kan., 113, 12 Pac., 535; *Mettler v. Easton & Amboy R. R. Co.,* 25 N. J. Eq., 214.

It is also contended that the supreme court has no original jurisdiction to entertain an application for an injunction in a case like this, unless presented in the same manner and upon the same facts as it was submitted to the court below.

According to the record before us, as we are to consider it, the case has been so submitted. It is well settled in our supreme court that appealed cases must be based upon matters contained in the record. It is not a trial *de novo;* additional averments, or evidence, or *ex parte*

matters cannot be introduced.—*Luthe v. Luthe,* 12 Colo., 430-431, 21 Pac., 467; *German Nat. Bank v. Elwood,* 16 Colo., 244-246, 27 Pac., 705.

We do not understand that the application to the supreme court for the injunction comes within the purview of section 3, article 6 of the constitution, as contended by the appellees. The record shows that an application was made in the court below for a temporary injunction, which was denied; then the court held in effect that, as the only permanent relief sought in the complaint was a perpetual injunction, or making the temporary injunction perpetual, the action should be, and was, dismissed. The appellants appealed to the supreme court, and applied to the court below for a temporary injunction pending the appeal, which was also denied; then the appellants applied to the supreme court for a temporary injunction, which was granted, and an order was issued on the appellees to show cause why the writ should not be made permanent. We gather from the record that it was the purpose of the supreme court and the parties to the action to have a final judgment rendered in the matter in that court, which is authorized under section 398, page 707, Mills' Annotated Code, which reads as follows:

"In all cases of appeals and writs of error, the supreme court may give final judgment and issue execution, or remand the cause to the lower court, in order that execution may be there issued."

The appellees further insist that there is no defendant in this cause against whom a writ might issue.

The suit is brought against "Thomas Ryan, J. A. Burnett and C. L. Nachtrieb, constituting and being the board of county commissioners of the county of Chaffee in the state of Colorado." Section 778, page 746, 1st Mills' Annotated Statutes, provides that the proper title for suits against a county is "The board of county commissioners of the county of ....." The title stated in this case is technically insufficient, and if the appellees

had objected in the court below and properly preserved their objection in the record, then they could have the point properly considered here. However, the order appealed from is properly entitled "The board of county commissioners of Chaffee county, Colorado, defendants," and the final order states that Wallace Schoolfield, Esq., appeared for "The board of county commissioners of Chaffee county, Colorado, defendants," and it appears throughout the record that the parties plaintiffs, defendants, andd the court below treated "Thomas Ryan, J. A. Burnett and C. L. Nachtrieb, constituting and being the board of county commissioners of Chaffee county, Colorado, defendants," and "The board of county commissioners of the county of Chaffee" as synonymous terms, and all parties understood and treated the appellees as "The board of county commissioners of the county of Chaffee;" and, the appellees not having raised any question as to the proper entitling of the case, and having appeared for "the board of county commissioners of the county of Chaffee" and defended in the court below and in the supreme court, this court should, and does, hold that "the board of county commissioners of the county of Chaffee of the state of Colorado, defendants," are bound by these proceedings and by any order or decree of the court that may properly be made herein.

"A defect of parties must be raised either by demurrer or answer, and if not so raised it is waived."

Fitzgerald v. Burke, 14 Colo., 559-562, 23 Pac., 993; *Great West Min. Co. v. Woodmas of Alston Min. Co.,* 12 Colo., 46, 20 Pac., 771, 13 Am. St., 204; *Poundstone v. Holt,* 5 Colo. App., 66-69, 37 Pac., 35; *Miller v. Kinsel,* 20 Colo. App., 346-349, 78 Pac., 1075; sections 50, 54 and 55, Mills' Annotated Code.

In this case no defect of parties has been raised by answer or demurrer, or at all, except by suggestion in brief of counsel in the supreme court, which is wholly in-

sufficient; though defects do occur which should have been corrected if properly raised.

Section 5838, Revised Statutes of 1908, requires viewers to assess the damages and benefits to owners of any land over which a proposed road may pass. Section 5842, of said statutes, requires the viewers to file a report with the county clerk ten days before the next regular meeting of the board of county commissioners held after the view is completed, giving a description of the land, an assessment of the damages and benefits accruing to any person, and the sum awarded to any person in excess of the benefits, with a plat, survey and a report of the surveyor. Section 5843 of said statutes requires the board of commissioners, at their next regular meeting after the return of said report, to consider the same and all objections that may be made thereto, and to determine whether or not said road shall be established and opened to travel, with permission to such board of commissioners to refer the matter of viewing to the same or other viewers with instructions to report in like manner, or specially upon some particular matter.

As private property can be taken for public use against the consent of the owner only in such cases and by such proceedings as may be specially provided by law, and these proceedings are not according to the common law and are in derogation of private rights, and as they wholly depend upon statute regulation in this state, anyone using this extraordinary and harsh power must substantially, at least, comply with all the provisions of the statute; and we think, under the allegations in the complaint, that there has not been a substantial compliance such as we think is necessary to justify the board of county commissioners of the county of Chaffee to proceed with the opening of said road; and, therefore, it is ordered and decreed by the court that said board of county commissioners of the county of Chaffee should be

restrained and perpetually enjoined from opening the road or roads described in the complaint under the proceedings heretofore had and taken in the premises; that the judgment of said district court dismissing the action should be and is hereby reversed and held for naught, and this cause is remanded to said district court with directions to issue a perpetual injunction against the board of county commissioners of the county of Chaffee permanently restraining said board and its successors in office from opening any road or roads through the premises of the appellants as mentioned or described in the complaint, on any of the proceedings heretofore had in this action; and that the costs of the appellants be taxed against said board of county commissioners of the county of Chaffee.

[No. 3656.]

THE COLORADO MIDLAND RAILWAY COMPANY v. EDWARDS.

1. MASTER AND SERVANT—*When the Relation Exists.* The switching crew of a railway company was accustomed to operate cars and engines upon certain tracks, the property of, and within the private premises of, a mining company, but connected with those of the railroad company. The crew so employed were in the general service of the railway company, operated under its rules, were borne upon its payrolls, and the cars and engines were the property of that company. *Held* that though while so employed, the crew acted under the direction of the mining company as to where cars should be set, they were still the servants of the railroad company, and that company was liable for their neglects.

2. RAILROAD COMPANY—*Movement of Trains.* A railway company switching cars within the premises of a mining company at a time when, as those in charge of the work are aware, the employes of the mining company are liable to be upon or in proximity to the tracks, are under a manifest duty to give a signal or warning when a car is to be set in motion; failing in this the railway company is liable for an injury to a servant of the mining company, who, without fault upon his part, is injured by the neglect.

3. EVIDENCE—*Affirmative and Negative Testimony.* The question being whether the bell of the locomotive was ringing before and at the time of an accident, the affirmative testimony of witnesses that it *was* ringing is not necessarily to be preferred to that of others, who, with equal opportunities, did not hear it. The question is for the jury.

4. CONTRIBUTORY NEGLIGENCE—*Evidence.* Action for an injury attributed to negligence in the operation of defendant's locomotive in switching. Defense, contributory negligence. The evidence examined, and *held* that the question was properly left to the jury.

5. INSTRUCTIONS—*Duty to Pray.* Where in an action for negligence plaintiff gives no evidence of certain particulars of negligence charged in the complaint it is the duty of defendant's counsel to apply to the court for an instruction withdrawing these matters from the attention of the jury; and it is the duty of the court to give such instruction.

6. —— *Exceptions to,* must be taken before the jury retires.

7. APPEALS—*Prejudicial Error Must Affirmatively Appear.* and the burden is upon the appellant to show error.

8. BILL OF EXCEPTIONS—*Construction.* The bill of exceptions is construed most strongly against the excepting party.

Appeal from El Paso District Court. HON. W. S. MORRIS, Judge.

Messrs. ROGERS, ELLIS & JOHNSON, for appellant.

Messrs. MCKESSON & TURNER, for appellee.

CUNNINGHAM, Presiding Judge.

On the 17th day of December, 1908, plaintiff was injured by a car of the defendant company running over his right foot and leg, so injuring that member as to require amputation. On September 3, 1909, plaintiff filed his amended complaint, on which the case was tried, in the district court against appellant and the Golden Cycle Mining Company. On the trial he dismissed his suit as to the latter defendant. The jury awarded plaintiff a verdict of $5,000. The record discloses the following facts: The Golden Cycle Mining Company owns a reduction works at or near Colorado City, and in close prox-

imity to the main line of the appellant company. The Golden Cycle Company had laid a spur track connecting its reduction works with the main line of appellant's railway, said track being the sole property of the Golden Cycle Company. It was the custom of appellant to run its cars and engines over these spur tracks for the purpose of switching cars of ore consigned to the Golden Cycle Company into the yards of said company, and placing such cars as directed by the Golden Cycle Company. On the morning of the 17th of December, and immediately before the accident, Edwards, who was an ore shoveller in the employ of the Golden Cycle Company, emerged from an ore bin or chute which was located beneath the surrounding surface. One or two cars belonging to the defendant company stood at the mouth of the ore chute from which plaintiff emerged. These cars were entirely disconnected from any train or engine. The opening of the ore chute through which Edwards reached the surface was located very near to the end of one of these cars, and, as he straightened up after clambering upon the platform, his body appears to have been in the line of these cars. At any rate, an engine propelling one or more cars, and coming from the west, struck the end of one of the cars, opposite from the end where Edwards was, and shunted the disconnected car over plaintiff's limb, resulting in the damages sued for.

1. One of the contentions of the defendant is that while its switching crew was operating in the yards of the Golden Cycle Company, it was not in the employ of the railroad company. This contention is based upon the theory that the railroad company simply loaned its switching crew and equipments to the Golden Cycle Company whenever the latter company desired work done in its yards which required such crew and equipments, hence, it is contended by appellant, if there was any liability to

the appellee in this case the Golden Cycle Company, and not the railroad company, must respond. We cannot yield assent to this contention. The switching crew consisted of an engineer, a fireman, two brakemen or switchmen, and a switching boss or foreman. All of the equipment used by this crew was the property of appellant, and the crew was on its payrolls. It is true the evidence discloses that while switching ore cars and doing work of that sort upon the premises of the Golden Cycle Company the crew acted under the direction of that company, to the extent of placing and moving cars pursuant to a switching list furnished by the representatives of the Golden Cycle Company. But we are persuaded that this is not sufficient evidence to warrant us in holding that the switching crew was loaned by the railroad company to the mining company, and that the said crew *pro haec vice* became the employes of the latter company. Authorities are cited by appellant to support this contention, but we are convinced by a careful reading of them that, in most instances at least, the facts involved in this case and the facts upon which the cases cited by counsel for appellant turn are so substantially different as to make these authorities inapplicable. Take, for instance, the case of *Sexton v. New York Central Co.*, 114 App. Div., 678, 99 N. Y. S., 1111, which counsel for appellant asserts is closely in point, and from which he quotes at length: it appears in that case that the engine of the railroad company had been employed in the yards of a foundry company exclusively for some weeks prior to the accident; that in the operation of its business at the time of the accident the foundry company employed two engines, one of which belonged to it, and the other to the New York Central railroad; that "the crew, although hired and paid by the defendant (the railway company), were under the direction of the then foreman of the Corrigan Company, to whom they re-

ported in the morning, and to whom they looked for all instructions in regard to the work each day." The record in this case discloses no such state of facts. It was the custom of the switching crew of the railroad company to go upon the premises of the reduction works and do whatever switching was required to be done, so as to complete it, if possible, by eight o'clock in the morning, but there is nothing in the record to indicate that the reduction company had any authority to order the switching crew when to appear, or when to cease its work of switching in its yards; there is nothing to indicate that there was an officer of that company known as a "yard foreman;" the reduction company, so far as the evidence indicates, had no engine of its own, but relied entirely upon the railroad company for such work. Moreover, it appears conclusively that the reduction company; not under rules and regulations formulated by that company, but under the general rules and regulations formulated by its employer, the railroad company, and precisely as the crew operated when in the yards of the railroad company. We quote the following from the testimony of witness Russell, the engineer, who was in charge of the switch engine at the time of the accident:

"I have a book of rules of the company in regard to the signals that should be given. (It is evident from what follows and from the admissions of counsel for appellant in the brief that the witness here refers by the use of the word 'company' to the railroad company.) Before going to work switching in the Golden Cycle Mill I was required to sign a schedule of rules. (Referring to the book in his possession.) This one. This is the only one that I had to sign. There is nothing in the set of rules regulating the signals that must be given in entering an ore house where men are at work. There is no rule, in the book of rules by which I am working for the Colorado Midland, at any one place for any one movement in any place; in the

Golden Cycle Mill, or anywhere else. I work only under the direction of the company at all times; both on the road and at places of that kind. There were no rules especially belonging to this particular place where the accident occurred. (Which was on the premises of the Golden Cycle Company.) Before backing the cars into the ore sheds the rule requires me to ring the bell."

Witness is here referring to rules furnished him by the railroad company. The supreme court of New York, in the Sexton case, *supra,* lays stress upon the fact that the employment of the engine and crew of the railroad company in the yards of the foundry company was permanent, and, commenting upon the exclusiveness of the foundry company's control over the crew, uses this language:

"The defendant, for the period in which it loaned the use of its engine and crew, surrendered the entire control of its employes to the Corrigan Company. The railroad company could not, during such use, direct its employes as to the manner in which the work for the Corrigan Company should be performed, *or make rules and regulations for their guidance.* These were things entirely within the charge and control of the foreman of the Corrigan Company directing the work and the manner in which it should be performed."

[The italics are ours.]

Witness E. F. Smith, manager of the reduction mill operated by the mining company, testified as follows:

"When cars were placed in the mill by the Colorado Midland Railway Company the transportation line controls the movement of the cars. The mining company has nothing to do in the exercise of any control over the movements of the cars in the ore shed beyond the giving of instructions as to how they desired the cars to be brought in. * * * In the process of setting cars they would be under the exclusive charge of the trainmen."

On cross-examination, apparently conducted by counsel for appellant, the following questions were propounded to this witness, and the following answers made:

"Q. What do you do to designate that you want car number so and so, or car number something else, to be put in this place for unloading?

"A. We give them a schedule.

"Q. You give them a schedule and there your authority ceases?

"A. Yes sir."

Witness Sonnichsen, engine foreman for the Colorado Midland Railway Company, who had charge of the switching crew at the time of the accident, was called by defendant, and, among other things, testified as follows:

"I was at the Golden Cycle mill on the morning of December 17th, the morning Mr. Edwards was hurt. I was superintending the movements of the switch engine in regard to setting the ore for the mill people. The movements that the engine made were under my direction. I received my instructions indirectly from the yard master. I was furnished with a switch list with the numbers and initials of the cars, and with that list I used my judgment in placing the cars."

On cross-examination this witness testified as follows:

"I considered that I was foreman of the train and had charge of its movements. I was in the employ of the Colorado Midland Company."

We are not advised by anything in the record concerning the arrangements which existed between the railroad company and the reduction company with reference to the compensation of the former for performing the work in the yards of the latter. The mere fact that the reduction company handed to the switching crew a switching list, indicating where it desired cars set, would not in and of itself be sufficient to change the status of the

switching crew from that of employes of the railroad company to employes of the reduction company. All work done by the railroad company for the reduction company, whether in the yards of the latter, or in the yards and upon the main line of the railroad company, is, in a sense, done under the direction of the reduction company; that is to say, it is done pursuant to a request emanating from the reduction company. Indeed, all work done by a railroad company for its patrons is ordinarily done under such direction, since it rarely engages in hauling or moving freight belonging to itself, but usually is employed in moving and handling the property of others.

2. The appellant insists that it was guilty of no negligence, and contends that the plaintiff was guilty of contributory negligence. A consideration of these two questions necessitates a somewhat fuller statement of the facts surrounding the accident than that which has already been given. At the time of the accident the plaintiff had been in the employ of the Golden Cycle Company as an ore shoveller for a period of about seventeen days. A part of his duties required that he go down into certain ore bins situate below the surface, and in close proximity to the switch track in question. On the morning of the accident he began his work at eight o'clock. He testified that during the time he had been employed with the reduction company he had never known the railroad company to do switching after eight o'clock in the morning. The foreman of the switching crew insisted that it was not unusual for a crew to do switching in the yards of the reduction company after eight o'clock in the morning, and he testified:

"It was a usual thing to be working around there near eight, or varying either way a few minutes from eight o'clock."

On cross-examination the switch foreman testified:

"It was customary to set the cars in on the east track

as near eight o'clock as we could. We always tried to have the work completed before eight o'clock, but it was not an unusual thing to be working around there after eight o'clock. It was expected of the railroad company to have cars set over the ore bins so that the men could go in those cars and go to work at eight o'clock. We did that as near as we could, but it was a very frequent occurrence for cars to be run over the ore bins and back and forth after eight o'clock."

At the time of the accident the switch engine was coming from a westerly direction towards the ore bin where appellee was working. It was pushing one or more cars ahead of it. The car which came in contact with the body of plaintiff was standing, as we have said, disconnected from the engine, immediately before the accident. None of the employes of the railroad company were in a position where they could see plaintiff as he emerged from the ore bin, yet from what has already been said, it is clear that the switching crew knew that at or about eight o'clock (and the accident occurred a few minutes after eight) ore shovellers were likely to be working in and about the ore bins. The question is: was it the duty of the employes of the railroad company under the circumstances here disclosed to give warning of some kind that its engine was approaching the ore bin, where it was at least probable employes of the reduction company might be at that time of day working, and in a position of great peril? Clearly, we think this question must be answered in the affirmative, hence it follows that if the railroad company did not give warning of the approach of its engine, it failed to discharge its plain duty in that behalf, and was guilty of negligence, and is liable for any damage which was proximately occasioned the plaintiff by such negligence, unless, of course, the plaintiff himself was guilty of negligence contributing directly to the cause of his injury.

This brings us to a consideration of an important feature of this case, viz.: whether the railroad company did or did not give warning of the approach of its engine. It is asserted on behalf of plaintiff that no warning of any kind was given, while it is stoutly contended on behalf of appellant that the bell was rung continually from the time the engine started eastward until it struck the car which inflicted the injury of which plaintiff complains. The testimony of plaintiff on this point is that he, the plaintiff, did not hear the bell ring, and he could have heard it if it had been rung. Morris Harvey, a witness for plaintiff, testified that he did not hear the bell ring, and that he was about twenty feet from the engine. John Doysick, a fellow-laborer, who came out of the ore bin immediately ahead of the plaintiff, and but a moment before the accident, testified that he did not hear the bell ring. John Mascow, a witness for plaintiff, who was standing nearby, did not hear the bell ring, and the foreman of the defendant's switching crew testified that he had no recollection of hearing the bell ring, although it is admitted in the brief of appellant that he was, with the exception of the engineer and fireman, probably in the best position to hear the ringing of the bell. Appellant insists that this testimony, being largely negative in its character, is so untrustworthy that it must give way before the positive and direct testimony of the fireman and engineer, who stated positively that the bell was ringing at the time of the accident. In support of this contention, counsel cites the following federal cases: *Dunlop v. United States,* 165 U. S., 486, 41 L. Ed., 799, 117 S. C. Rep., 375; *Rich v. Chicago Ry. Co.,* 149 Fed., 79, 78 C. C. A., 663; *Chicago & N. W. Ry. Co. v. Andrews,* 130 Fed., 65, 64 C. C. A., 399. Because of the dissimilarity in the facts involved, these federal cases are not controlling. In the *Rich* case (we quote from the syllabus) it is,

"HELD, that the evidence of witnesses who were not

paying attention to the engine at the time, *and were not necessarily in a position to have heard any bell ring or whistle sound* before the accident, that they heard neither bell nor whistle is insufficient to constitute a substantial conflict and warrant a finding that there was negligence in failing to ring the bell or sound the whistle." [Italics ours.]

The rule contended for by appellant, and which we are now considering, is to the effect that the testimony of a witness who testifies to an affirmative should be preferred to that of a witness who testifies to a negative. Commenting on this rule, Judge Adams, in the Rich case, warns against its broad and unrestricted application, saying:

"While the foregoing rule is a valuable one to prevent speculative and unwarranted verdicts, and should be fearlessly applied in appropriate cases, no liberty should be taken by the trial judge under its supposed protection to waive the force or value of evidence which is substantially uncontradicted. Where 'circumstances attending the failure to notice an occurrence are such as to afford reasonable ground to believe that if the occurrence had happened it would have been noticed by the witnesses, the failure to notice it may be and frequently is some evidence that it did not occur, and should go to the jury for its consideration.' "

Indeed, it would seem that in many, if not most, cases where witnesses are attempting to testify that a bell did not ring or a whistle blow, they can only say, "I did not hear." If the rule contended for here by the railroad company be adopted without qualification, then it would become extremely difficult, if not impossible, for a plaintiff who relied on a lack of warning signals designed to appeal to the ear only, to make out a case of negligence. The difference in the weight to be given to the affirmative testimony of a witness who says: "I heard the bell ring,"

and the weight which should be given to another witness standing in a position equally favorable for hearing, who says: "I did not hear the bell ring," is not so great, perhaps, as has sometimes been supposed.

It would unduly prolong this opinion for us to analyze the *Andrews* case, *supra,* but a casual examination of the syllabus discloses how overwhelming the testimony in that case was against the contention of the plaintiff therein. From the syllabus we quote the following:

"The engineer testified that he saw plaintiff apparently about to cross the track, and gave two alarms. *Eighteen out of nineteen witnesses for both parties* also testified that they heard such a whistle. *A number of other parties testified that they looked along the track westward and plainly saw the approaching train, while there was no testimony except plaintiff's* that the view was obstructed."

And yet, in the face of such a record, Judge Thayer writes a vigorous dissenting opinion, in the course of which he says:

"The majority of the court says that in view of the situation the plaintiff's testimony 'is entitled to no credence and does not create a conflict of evidence, for which reason it should have been disregarded and the jury directed to find a verdict in favor of the defendant.' I do not concur in that view. I think that this court has no right to disregard the plaintiff's testimony, and that it cannot do so without usurping the functions of the jury. In this class of cases there may be things happen that the testimony of a witness that he looked in a given direction and did not see an approaching train is so far at variance with the facts of the situation as to justify a court in disregarding it, because if he looked he must have seen it. The case at hand is not of that kind. * * * At all events it was the function of the jury to say whether he acted with ordinary prudence, or should have waited

longer until the smoke cloud floated away, and studied the situation more carefully. On the whole, therefore, I conclude that it cannot be said that twelve reasonable men listening to the testimony contained in this record must have found that the plaintiff testified falsely, and that he went on the track heedlessly, without looking to the west or listening. Twelve jurors acting under proper instructions have in fact found the contrary of this contention, and this court should not reverse that finding if the right of juries to determine issues of fact is to be further respected."

We think the rule laid down by Judge Thayer in the dissenting opinion more clearly accords with the rule which obtains in this state, established by the decisions of our supreme court, than does the majority opinion in either of the three federal cases cited by appellant. See *Phillips v. Denver Co.*, 53 Colo., 458, 128 Pac., 460; *Williams v. Sleepy Hollow Co.*, 37 Colo., 62, 86 Pac., 337, 7 L. R. A. (N. S.), 1170, 11 Ann. Cas., 111.

Moreover, the jurors were the proper judges of the credibility of the witnesses who appeared before them, and it may well be that the responsibility of the fireman and engineer on the switch engine (the only witnesses out of a switching crew of five men who testified that the bell was rung) for the accident in question, and their demeanor on the stand while giving their testimony, justified the jury in disregarding their evidence. Applying the rule laid down by the supreme court of Colorado to the evidence in this case we are of opinion that there was sufficient evidence of negligence on the part of appellant to warrant the submission of the question to the jury.

3. We will next consider whether under the evidence the trial court should not have determined, as a matter of law, that the plaintiff was guilty of contributory negligence, and, for that reason, taken the case from the jury. The plaintiff testified that directly upon emerging from

the ore bin through the chute to the platform, and before straightening himself up so as to bring his body in a position where it could be struck by the car standing by the chute in the event said car was moved:

"I stopped and looked back towards the east, for I expected those cars to come that way. I didn't know, and I stopped and turned round to the west and stood there an instant. (The engine was coming from the west.) I did not observe any cars in motion anywhere. I did not see any person. There was no brakeman on that car which I saw (evidently meaning the stationary car near the mouth of the ore bin). I did not hear the sound of any whistle or any bell."

On cross-examination plaintiff was asked this question:

"Consequently, you did not look to the west to see whether there was any car coming; you only looked in one direction? A. I looked all round, both ways."

And, again, on cross-examination, he testified:

"My glance in the direction in which the car was coming was only for an instant. I did not see any car coming."

There was testimony to the effect that a pile of ore was lying near the mouth of the bin between where plaintiff stood and the approaching engine which would at least tend to shut off his view. Applying the rule laid down in *Phillips v. Denver Company, supra,* we think the evidence just quoted, and other facts already alluded to, makes the question of contributory negligence one for the jury.

4. The only remaining question which demands our consideration pertains to the instructions. Much of appellant's complaint going to the alleged errors of the trial court in the giving of instructions proceeds upon its theory, heretofore considered and disposed of, that the Golden Cycle Company was in control of the switching

crew, and upon its further contention, which we have declined to accept, that there was not sufficient evidence of negligence on the part of appellant to take the case to the jury. In this connection counsel for appellant, with commendable frankness, say:

"Unquestionably it would be negligence on the part of the trainmen to back a string of cars over the track near the ore bin without ringing the bell or giving any signal or alarm. The part of the instruction submitting this question to the jury would, therefore, be unobjectionable if there were sufficient evidence to go to the jury upon the issue that the bell was not rung, and if, as a matter of law, the appellant, and not the Golden Cycle Mining Company, were *pro hac vice* the master of the train men and responsible for negligence at the time the accident occurred."

The complaint charged several independent acts of negligence on the part of appellant, and the instructions of the trial court appear to have submitted to the consideration of the jury all of the various acts of negligence alleged in the complaint, whereas it is contended on behalf of the railroad company that as to many of the negligent acts charged in the complaint there was no supporting proof whatever. We have already determined that there was sufficient evidence of negligence on the part of the railroad company, in not causing its bell to be rung, or in some other equally effective manner giving warning to the appellee of the approach of its train, to carry the case to the jury. If there were other acts of negligence charged against the defendant concerning which there was no proof whatever offered, it seems highly improbable that the jury would have based its verdict of guilty upon such wholly unsupported allegations, rather than upon an allegation concerning which there was ample evidence offered to support their verdict. While it was the duty of the trial court to withdraw from the considera-

tion of the jury all allegations of negligence made in the complaint not supported by evidence, a corresponding duty rested upon the defendant to tender an instruction withdrawing such charges or issues, or in some other manner affirmatively directing the attention of the trial judge to his duty in this behalf. In this respect appellant, as well as the trial court, was remiss in its duty. But, for the reasons already stated, we are of opinion that there is nothing in the record to warrant the conclusion that the error of the trial court which we are now considering prejudiced the rights of appellant. It has been well said that not every error calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it.—*DeLappe v. Sullivan,* 7 Colo., 182, 2 Pac., 926; *Schoolfield v. Houle,* 13 Colo., 394, 22 Pac., 781.

The courts of the state have repeatedly ruled that the burden of showing error is upon the appellant or plaintiff in error, and in order to secure a reversal of the judgment of which he complains prejudicial error must affirmatively appear in the record.—*Kinsel v. Wieland,* 38 Colo., 296-9, 88 Pac., 153; *Stewart v. Schiffer,* 43 Colo., 515-6, 96 Pac., 169; *Stubbs v. Montezuma Co.,* 45 Colo., 219-221, 100 Pac., 433.

Moreover, it is a matter of grave doubt (at least it is fairly debatable) whether under the record before us it is our duty to consider any question of error predicated upon the trial court's instructions. The record does not disclose when appellant saved its exceptions to the instructions—whether before or after the case had been submitted to the jury. The record on this point reads as follows:

"The defendant, the Colorado Midland Railway Company, excepts to Instruction No. 1 of the instructions given by the court to the jury," etc.

Our appellate courts have frequently held that in

order to avail one who complains of the instructions of a trial court, his exceptions must be claimed in such time and manner as to afford opportunity to the trial judge to recede from his position as announced in the instruction objected to, if he chooses so to do.—*Taylor v. Randall,* 3 Colo., 399; *Dawson v. Coston,* 18 Colo., 493, 33 Pac., 189; *Denver Co. v. Ryan,* 17 Colo., 98, 28 Pac., 79.

In *Taylor v. Randall; supra,* it is expressly ruled that "a bill of exceptions must be construed most strongly against the party who prepared it." In *Dawson v. Coston, supra,* it is said:

"The second assignment of error is not tenable for the reason that it nowhere appears from the record that the instructions complained of were objected to in apt time. That this is necessary in order to obtain a review upon such ground is fully settled by this court in several cases."

Citing many Colorado cases. We have examined the abstract of record in the Dawson case, and find therein the following statement:

"After introduction of evidence the following instructions were given the jury at the request of plaintiff, and over the objection of the defendant." (The appellant in the Dawson case was the defendant below.)

If it be said that the appellee in the instant case has interposed no objection in this court to the consideration of the trial court's instructions, we answer that we find no such objection in the brief of appellee in *Dawson v. Coston.* In *Mann v. Dempster,* 179 Fed., 837, 103 C. C. A., 325, the following is quoted from *Phelps v. Mayer,* 15 How., 160, 14 L. Ed., 643:

"It has been repeatedly decided by this court, the supreme court of the United States, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were

at the bar. * * * It (meaning the exception) need not be drawn out in form and signed before the jury retires; but it must be taken in open court, and must appear by the certificate of the judge who authenticated it, to have been so taken."

The same case was again before the circuit court of Appeals, second circuit, and in the second opinion, which appears in 181 Fed., 76, 104 C. C. A., 110, the former ruling was not only upheld, but the court went further and ruled that exceptions to instructions reserved after the jury had retired could not be reviewed even though the adversary assented to such review.

Discovering no error in the record prejudicial to the substantial rights of appellant, the judgment of the trial court is affirmed.

Judgment Affirmed.

Decided June 10, A. D. 1913. Rehearing denied July 14, A. D. 1913.

[No. 3879.]

SCHON v. CROUCH & CASE.

1. CONTRACTS—*Hard Bargain.* A purchase not induced by any fraud or imposition on the part of the vendor is not relieved against for the mistake of the purchaser.

2. APPEALS—*Judgment.* Judgment for plaintiff reversed and the court below directed to dismiss the action.

Error to Pueblo District Court. HON. J. E. RIZER, Judge.

Messrs. MCCORKLE & MCCORKLE, Mr. JAMES A. PARK, for plaintiff in error.

Messrs. ADAMS & GAST, for defendant in error.

CUNNINGHAM, Presiding Judge.

On July 10, 1909, defendants in error, Crouch & Case, filed their complaint in the district court to recover from

the plaintiff in error, Schon, the sum of three hundred thirty ($330) dollars. The complaint contained two causes of action, both being based upon the same transaction. The first cause of action was for money had and received; the second for money paid by mistake. The facts involved present for our consideration a somewhat unusual case. Stated as briefly as may be they are substantially as follows: (We shall, for convenience, treat Crouch as the sole plaintiff, and from time to time will allow his name to stand for the partnership, while the plaintiff in error, Schon, will be referred to hereinafter as the defendant.)

On or about the 21st day of December, 1908, the defendant owned a building in the city of Pueblo, which was situated upon land belonging to a third person, defendant paying rent for the lot on which this building stood. This building he occupied as a butcher shop and grocery store, he owning the fixtures therein. At about the time last aforesaid Crouch, representing the partnership of Crouch & Case, entered into an agreement with Schon, by the terms of which the former purchased from the latter the stock of meats and groceries and a safe, agreeing to pay therefor the sum of $697.27, the value of the safe being $40. As a part of the same agreement it was provided that Crouch should rent the building and fixtures from Schon for one year, paying therefor $55 per month, $25 of this sum being for ground rent which Schon was obligated to pay the owner of the lot. One-half of the first year's rent, or $330, Crouch was to pay in advance. It will thus be seen that under the first agreement (there was a second agreement to which we shall presently refer) Crouch was obligated to pay Schon in cash for the stock of goods $657.27, for the safe $40, for the half year's rent cash in advance $330, or a total of $1,037.27. On or about the first day of January, Crouch entered into possession of the stock of goods, at which time he paid $600

to Schon, which was in addition to $100 paid at the time the agreement was entered into, leaving a balance due to Schon of $327.27. It was further agreed between the parties that Crouch might buy the building at the end of six months, or at the end of the year's lease. It is not quite clear which of the two dates for the exercise of the option was intended, and no writing was entered into at the time or afterwards which embraced any of the conditions or provisions of the first agreement. There arose some slight difference between the parties at the time Crouch took possession of the store, which prevented the execution of a written agreement. On or about January 21, 1909, some three weeks after the plaintiffs had taken possession of the store, Crouch took up with Schon the matter of buying the building then without further delay. It will be well to quote from the abstract literally what occurred between the parties at this time. Schon testified on this point as follows:

"He (Crouch) came down and he says, 'Wouldn't you just as well sell this building now as to wait,' and I says 'Yes, I will sell it now.' He says, 'What do you want for it.' I said, '$350.00,' and he said if he could buy it he could turn it quicker. I says, 'You can have it; all you have got to give me is $350 and pay the taxes and some insurance policies.' And we made out how much was coming to me, and he fussed around about $25 ground rent. I says, 'You give me that money and you can have it. If you don't, leave it alone.' And he agreed to give me all the money I asked, and gave it to me, and I was satisfied. He paid me at that time $863.77. That is the amount I demanded he should pay. I would not take five cents less either. He did not have to buy the building. I did not push the building on him. He came to me and said he wanted to buy it. I told him he could have it for $350, and if he gave me $350 he could have the building. The

$864.77 was made up of merchandise, fixtures and the store building."

Schon testified further:

"I required them to pay me all that they had agreed to pay me theretofore and $350 in addition for my building. That is what we agreed to. I would not sign any paper before that. I asked $350 besides what they owed me, and I told them I would not sign any papers unless they paid it. He (Crouch) came and wanted me to sign the papers and I would not unless he gave me $350 in addition to what they owed me."

There was no attempt on the part of Crouch to contradict this testimony. On the contrary, Crouch himself, while on the stand, testified:

"At the time I paid Mr. Schon the check for $863.77 he said he would not take less than $863.77 to settle up with us. I don't know as he said that amount several times. We had argument over the taxes, but not over the total amount."

There were but three witnesses called in the case, and, as we read the record, only the testimony of Crouch and Schon is really of much importance. Singular to relate, there is no substantial conflict in their testimony.

The second and last agreement took place in a law office, and at that time and place Crouch gave a check to Schon for $863.77. This sum was made up by adding to the $350, at which Schon had priced the building, $161.50 the amount Crouch agreed to pay for the fixtures, one month's ground rent $25, and $327.27 the balance due to Schon from Crouch on the first agreement which involved the purchase of the groceries and safe, and the payment of six months' rent in advance. As a part of the second agreement the lease of the lot was transferred by Schon to Crouch, the latter binding himself to pay the rent as it

fell due to the owner of the lot, and thereby Crouch became the sole owner of the building, store fixtures and the leasehold, in all respects the same as Schon owned them before any negotiations had been entered into between the parties, the transfer of the lease having been made with the consent of the owner of the land.

At the time of the last agreement, when the parties were in the law office, in order to arrive at the exact balance due Schon from Crouch by virtue of the first agreement, Crouch telephoned to his partner, and Schon telephoned to his wife, each apparently in the presence and hearing of the other. Each received the same information, viz.: that there was a balance of $327.27 due to Schon on the first contract. Crouch testified as follows:

"I paid the $863.77 at the law office of McCorkle. At that time an itemized statement of the amount due Mr. Schon was made up. I presume the amounts were dictated by me."

The "itemized statement of the amount due Schon" evidently referred to the items which aggregated the $863.77, for which Crouch gave his check, and included the $327.27, the balance due on the first agreement. According to Crouch's testimony, some time in July, about six months after the second and last transaction, in going over their papers he and his partner, Case, discovered that they had paid Schon too much money; that inasmuch as they purchased the building some three weeks after they had taken possession of it, they ought, he contends, to have received credit on the purchase price of the building for the $330 which they had paid as six months' advance rent on the building and ground. At this point it will be remembered that by the terms of the second agreement Crouch assumed all responsibility for the payment of the ground rent from and after the date of the agreement, and released Schon therefrom. Upon making this discovery Crouch consulted an attorney, made a demand

upon Schon for the return of the $330, and, meeting with no encouragement, instituted this suit against Schon.

The case was tried to the court by agreement without a jury. The trial judge rendered judgment in favor of the plaintiff for $300, deducting $30 from his demand, apparently for one month's rent of the building, the plaintiffs having occupied the same for three weeks of that month while the building remained the property of Schon. From this judgment the defendant brings the case here for review by writ of error.

As we read the record, there is no evidence whatever that Schon received a dollar more at the time of the last settlement than he was demanding. He was under no obligation to dispose of the building at that time. There is not a word of evidence to support the theory that there was any mistake whatever on the part of Schon. There is no evidence in the record of any mistake on the part of Crouch at the time of this agreement, save and except his own statements to that effect. But, granting that he did overlook the fact that he paid $330 to Schon for advance rent, and that if he had bethought himself of this matter he would not have purchased the building at all unless he had received credit for that amount, it by no means follows that he, Crouch, can maintain an action either for money had and received, or money paid through mutual mistake. To permit him to do so would result, in this case, in allowing him to retain the property of Schon, and pay for it a sum of money which Schon would not willingly have accepted. In other words, it amounts to the court making a contract between the parties to which one of them would never have voluntarily assented. The hardship to Crouch of requiring him to pay $350 for a building on which he had paid the rent for six months in advance can only be relieved, if at all, by a rescission of the contract into which he inadvertently entered, through no apparent persuasion or deception on the part of Schon. The

parties were dealing at arm's length; Schon had a right at any time before six months or one year, as the case may be, to place whatever value he pleased upon his building. Crouch might pay this price or wait until the option period had expired and take the building at $350, the price stipulated in the original option agreement. He himself testified, when on the stand, that when he approached Schon with a view of buying the building, the latter told him that 'he would not take less than $863.77 to settle up with us.' Not one word appears to have been said by either party about the refunding of any rent that had been paid in advance. Crouch did not rely on Schon for his information as to the balance due the latter upon the first agreement, but telephoned to his partner, who kept their books, and received the information in this manner. Counsel for Crouch vigorously argues the foolishness of Crouch's conduct, if we assume that he voluntarily and knowingly agreed to pay $330 by way of advance rent on a building which he was buying and paying for and acquiring title to. This absurdity on the part of Crouch is more apparent than real. In fact, it is no more absurd than his first agreement, whereby he obligated himself to pay $30 a month rent for twelve months, or a total of $360, on a building that could have been bought for $350. If the option period of the original agreement expired in six months, as Crouch testifies, then all that can be said of Crouch's conduct in agreeing to pay $350 for the building some five months before the option period expired is that he advanced $350 five months before the time when he was obligated to pay it in order to secure title thereto. This conduct on his part is not extraordinary, in view of the fact that as a part of this second agreement, whereby this sum was so advanced, he acquired the fixtures of the store at a price satisfactory to him, which fixtures Schon had not obligated himself in the option to sell, and managed to acquire the transfer of the lease from Schon to

himself, with the consent of the owner of the property, and this lease the records shows, the owner had reserved the right to cancel on sixty days' notice to Schon. Presumably Crouch in the five weeks that intervened between the making of the first and the second contracts had an opportunity to test to his satisfaction the profitableness of the business which he had purchased. Furthermore, Schon testified, and this testimony, like all the rest that he gave, was not contradicted, that Crouch gave at the time of the second contract as one of his reasons for desiring to purchase the building then, that, "If he could buy it he could turn it quicker"—indicating that he had in mind a sale.

But it requires no speculative argument to disclose the inherent error in the judgment of the trial court which required Schon to return the plaintiff's money, which he had obtained from the plaintiff through no fraud or deceit, but as the result of a contract which he, Schon, thoroughly understood, and at the same time permitting the plaintiff to retain the property of Schon, when there is nothing in the record to indicate that he, Schon, would have parted with his property for any less than that which he received for it. Indeed, the probabilities are all against the assumption that Schon would have consented, had Crouch made such a demand, to credit the advance rent which he had received for the building on the purchase price thereof.

Leaving out of the question the fixtures, which it may be assumed Crouch took over at a fair valuation, since he makes no complaint on that score, we have this situation: Schon had rented his building for one year at $30 per month; he had in his pocket, in the form of advance rent, $180 which had been paid to him on the building. It seems quite improbable that in order to persuade Crouch to pay to him $350, five months in advance of the time when, if the latter saw fit to exercise the op-

tion of purchase contained in the original agreement, he would naturally expect to receive it, he, Schon, would take from his pocket this $180 and pay it over to Crouch as a bonus. If Schon drove a sharp bargain with Crouch, it was at the time of the first transaction, when he induced him to pay $30 a month rent on a building worth $350, and not at the time of the second, when, at most, he induced Crouch to pay $350 for his building, which he, Crouch, appeared to want, five months in advance of the option period. But no complaint is made by Crouch of the first transaction or its terms.

Inasmuch as it seems improbable, if not impossible, for Crouch at this time to maintain an action for the rescission of the contract, for the reason that he has probably sold the stock of goods which he purchased, and therefore could not tender that back, and place the defendant in *statu quo,* the judgment of the trial court will be reversed with directions to enter judgment for the defendant.

Reversed With Directions.

MORGAN, Judge, dissents.

Decided June 10, A. D. 1913. Rehearing denied July 14, A. D. 1913.

[No. 3583.]

THE EMPIRE RANCH & CATTLE CO. v. BATTELLE.

1. EQUITY—*Removing Cloud Upon Title—Parties.* The holder of a promissory note secured by a deed of trust of lands may sue to remove a cloud upon the title to the land.

2. JUDGMENT—*Record as Evidence.* The record of a decree quieting the title to lands is not admissible as evidence of the title unless accompanied by the antecedent proceedings leading up to the decree.

3. TAX TITLE—*Void Deed.* A treasurer's deed founded upon a sale to the county and an assignment of the certificate of purchase, by the county clerk, more than three years after the date of the sale, is void.

4. LIMITATIONS—*The Five Years' Statute* (Rev. Stat., sec. 5733) is no bar to a bill to remove a cloud upon the title to lands.

5. —— *The Seven Years' Statute* (Rev. Stat., sec. 4090) commenced its course, where a treasurer's deed is relied upon, with the recording of the deed.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. CHALKLEY A. WILSON, Mr. ASHER B. WILSON, for appellee.

KING, J., delivered the opinion of the court.

Action to remove cloud from title. From judgment in favor of plaintiff defendant appeals.

1. That the owner and holder of a promissory note secured by deed of trust on land has sufficient interest in the property to enable him to maintain a suit to remove a cloud from the title, caused by a void tax deed, is settled by the supreme court of this state in *Munson v. Marks,* 52 Colo., 553, 124 Pac., 187.

2. The county court decree purporting to quiet title in defendant, when offered by it to show title or as an estoppel, without being accompanied by the judgment roll or proceedings leading up to the decree, was not admissible in evidence, and was properly excluded.—*Terry v. Gibson,* 23 Colo. App., 273, 128 Pac., 1127; *Empire R. & C. Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522; *McLaughlin v. Reichenbach,* 52 Colo., 437, 122 Pac., 47.

3. The tax deed relied on by defendant as paramount title, and alleged by plaintiff to constitute a cloud on his title, was issued upon an assignment by the county clerk of the certificate of purchase more than three years after the date of the tax sale, and is therefore void.—*McLaughlin v. Reichenbach, supra; Empire R. & C. Co. v. Coldren,* 51 Colo., 115, 117 Pac., 1005.

4. Neither the five-year statute of limitations pleaded, nor the seven-year statute with payment of taxes under claim and color of title, was available to the defendant under the facts shown, as this was not an action for possession of land sold for taxes, and less than seven years had elapsed after the recording of the tax deed and before the commencement of this suit.

Perceiving no error in the record the judgment is affirmed.

[No. 3665.]

THE CONSOLIDATED LOWER BOULDER RESERVOIR AND DITCH COMPANY v. ALAUX, SR.

1. APPEALS—*Verdict on Sufficient Though Conflicting Evidence*, will not be disturbed, where the jury were properly instructed.

2. WITNESSES—*Experts*. The value of certain lands being in question, witnesses were offered, some of whom, at the time when the value is in question, and for several years before, resided and owned property in the vicinity, knew the lands in question, and knew of sales made of other properties, and the prices obtained; and one of whom had been a deputy assessor, and had bought and sold land in the same vicinity for twenty years. They were held competent to speak to the value.

3. DAMAGES—*To Lands by Seepage—The Measure of*, is the difference in value of the land immediately before the injury occurs and immediately after its culmination.

4. —— *Mitigation of—Evidence*. If in an action for an injury to lands the defendant would attribute the depreciation in value to causes other than his misconduct he must give evidence of such other causes, sufficiently clear and definite to warrant a just inference as to the effect thereof.

5. INSTRUCTIONS—*Objections to*. In an action for injury to lands occasioned by seepage from defendant's ditch, the defendant objected to an instruction warranted by the evidence, and assigned error thereon, suggesting other causes appearing in the evidence to which the depreciation might, in part, be attributed, and which were not adverted to in the instruction. But defendant failed in the court below to pray any instruction calling attention to the special and different cause of depre-

ciation, so relied upon. *Held* that by its default in this respect it was not in position to challenge the correctness of the charge given.

Appeal from Boulder District Court. HON. JAMES E. GARRIGUES, Judge.

Messrs. ROWLAND & GIFFIN, for the appellant.

Mr. O. A. JOHNSON, for the appellee.

MORGAN, J.

The Boulder district court rendered judgment on a verdict for the aggregate amount of $1,000 upon plaintiff's three separate claims for damages caused by the seepage of the water from defendant's irrigating canal upon the land of plaintiff, and two neighbors who assigned their claims to him, destroying the vegetation and injuring the soil and improvements, and thus lessening the value of the property. The defendant appeals. The judgment should be affirmed.

The appellant contends there was not "that preponderance of the evidence" to show negligence that the law requires in such instances. Of this question the evidence was conflicting, and the court instructed the jury that the "burden is upon the plaintiff to prove his alleged causes of action by the preponderance of the evidence," and to prove that "defendant's negligence was the proximate cause of the seepage, and that the property was injured thereby," and then defined preponderance; therefore, this contention is without merit.

It is further contended that witnesses were permitted to testify concerning the value of the property damaged, without sufficient qualification as to their knowledge. Their testimony was, that they lived and owned property in that vicinity at, and for several years prior to, the time at which the values were in question, that they knew the property involved, knew of sales being made and prices received for other property and that

they knew what such value was. One witness had been a deputy assessor there for four years, and one had bought and sold property there for twenty years. This was sufficient.

It is further contended that the court erred in instructing the jury, upon the question of damages, that—the measure thereof is the difference between the market value of the property damaged immediately prior to the time when the damage occurred and such value at the time the suit was begun, without further instructing the jury or calling their attention in any way to the depreciation in the value of the property caused by closing the mines near the place where the property is situated and the moving away from such vicinity of a number of the inhabitants thereof. This contention would be well founded, under this instruction (which should have limited the measure of damage to the difference, caused by seepage, between the market value immediately before the damage occurred and immediately after the final culmination thereof), if the testimony introduced by the defendant concerning such depreciation had been sufficiently definite in its character upon which to base such an instruction, and also if the defendant had requested the court, at the time, to instruct the jury in this regard, instead of merely objecting and excepting to the instruction given, without suggesting this feature. The evidence as to the wet condition of the land, damaged, from the beginning of the seepage, toward the commencement of the action, reasonably warranted the form of the instruction, but it may readily be comprehended that this instruction, given without calling the jury's attention to the depreciation in the value by other things than that complained of by the plaintiff, would be erroneous, if such depreciation clearly appeared from the testimony, in a definite and ascertainable form, and if the court had been requested to so instruct the jury, and did not in any other way cure

the defect; but the evidence did not establish anything more than the closing of the mines and the consequent decrease in the population and values. It was not shown to what extent property had depreciated for this reason.

The objection to this instruction was upon the sole ground that it was incorrect as to the measure of damages, and no instruction was tendered covering the defect, nor was the court's attention called to it. The court, however, instructed the jury in one or two instances that they must base their verdict upon the damages sustained on account of seepage from defendant's ditch; thus curing the defect complained of.

There was no reversible error committed by the lower court, and no substantial right denied the appellant, and, mindful of the statute requiring a disregard of all errors that do not go to the substantial rights of the parties, the judgment of the lower court is affirmed.

Affirmed.

[No. 3668.]

McKAY v. FLEMING.

1. CONTRACT—*Rescission by New Contract.* The execution and acceptance of a contract which renders impossible the performance of a former contract, is, presumptively, a substitution for and rescission thereof. This is the general rule even in the absence of full performance of the second contract. If the second contract is fully performed, the presumption becomes conclusive.

2. DAMAGES—*Release of.* And the latter contract waives damages for the non-performance of the former if there be no express agreement, at the time, to the contrary. Mere silence is not sufficient.

3. DURESS—*What is Not.* Defendant agreed to convey lands to plaintiff. In fact, he owned but an undivided half of the land, and plaintiff, in order to acquire the property, paid to defendant's co-tenant a price largely in excess of that stipulated to be paid to defendant. Plaintiff afterwards brought an action against defendant for this excess, claiming that by reason of defendant's failure he was compelled to pay the

excess in order to obtain the property to which he was entitled. This contention was repelled, the court holding that plaintiff, being at full liberty to stand upon his rights under the original contract, was under no compulsion.

4. Principal and Agent—*Ratification.* One who accepts and acts upon a contract made for his behalf, by an agent, vacating a previous contract, will not be heard to afterwards traverse the agent's authority, as the foundation of an action for the non-performance of the contract so vacated.

Appeal from Denver District Court. Hon. Carlton M. Bliss, Judge.

Messrs. Orahood & Hurlbut, and Mr. Horace N. Hawkins, for the appellant.

Mr. F. T. Johnson and Mr. W. W. Dale, for the appellee.

Morgan, J.

This is an appeal by the defendant from a judgment on a verdict in the Denver district court against him for $1,450, in an action upon an alleged breach of contract for the sale of real estate. The plaintiff, through an agent, obtained a written contract from the defendant, whereby $50 was acknowledged as paid in cash, and the property was to be conveyed on payment of the balance of the purchase price, on or before a given date, and if not so paid the contract to be void and the $50 forfeited as liquidated damages. It was provided that the balance was to be paid partly in cash and partly by notes, with mortgage upon the property. Later, and before the time expired to pay the balance and give the notes, the plaintiff, through his agent, received a letter from the defendant, stating that he could not convey the property, as he owned only an undivided one-half interest therein, and his co-owner would not convey the property for the price agreed upon. Neither the plaintiff nor his agent knew, prior to the receipt of this letter, that defendant owned

only an undivided one-half interest in the property, and the contract provided that the defendant should convey the entire property. After obtaining the information, by the letter aforesaid, plaintiff sent the agent to see the defendant and his co-owner, and to make some arrangement for the purchase of the undivided one-half interest not owned by the defendant. The agent thereupon made a written agreement with the defendant's co-owner, similar to the one made with the defendant, whereby plaintiff agreed to pay $1,450 more for the co-owner's half interest than was contemplated by the first contract. At the same time, the agent made another written agreement with the defendant, himself, quite similar to the first agreement with him, naming $50 as part payment on the purchase price, the same as in the first contract. The second contract with the defendant differed from the first in the following particulars: an undivided half interest, only, was contracted for, the price being proportionately the same, one-half of the amount named in the first contract; a different date was set for the payment and conveyance, which was one day before the date set in the first agreement; all of the money was made payable in cash; a slight change was made as to the assessment tax to be paid by the seller, and a day certain was set and a place agreed upon to complete the sale; the word "option" was used once or twice in the second agreement, and not used in the first. Afterwards, and before the time expired for the consummation of the first contract, the sale was completed at the time and place and according to the terms and provisions of the two later contracts. Within a few days thereafter plaintiff demanded of defendant the money herein sued for, and, on defendant's refusal to pay it, this action was begun.

The plaintiff, by making the second contract of purchase with the defendant, lost all right to rely upon the first contract, either to enforce it as a contract of sale or

to rely upon it in a suit for damages for a breach thereof. After the second contract was made, the defendant was put in a position so that he could not comply with the first contract without violating the second, and the sale was closed under the second before the time expired within which the defendant could comply with the first. The plaintiff's agent suggested and wrote the second contract, in which defendant acquiesced. The plaintiff says he was compelled to make the second contracts in order to overcome defendant's inability and refusal to comply with the first, and in order to make certain the purchase of the entire property; but if plaintiff elected to sacrifice his rights under the first contract, in order to make certain his purchase of the property, he ought not thereafter to complain. He was not compelled to do this, except in the sense that he was compelled to choose this horn of the dilemma. This was not duress under the law, nor would it enable plaintiff to avoid the effect of the second contract.—*Simmons v. Sweeney,* 109 Pac., 265, 13 Cal. App., 283; 9 Cyc., 448. When plaintiff found the defendant unable, and thereby unwilling, to perform the first contract, he could have rested upon his rights under the first contract, and could have brought suit (Pomeroy on Specific Performance, secs. 173 and 434) for the specific performance thereof, demanding that defendant convey his half interest, and abatement or compensation for the failure to convey the other half, or, for damages for its breach; or he could have done what he did; but he could not do what he did and still rely upon his right to a suit for damages under the first contract. A party cannot avail himself of the non-performance of a contract if his own act has prevented performance. His act estops him.—*Young v. Hunter,* 2 Seld., 207; *Richardson v. Cooper,* 25 Me., 450; Broom's Legal Maxims, 279, 282; *Rude v. Levy,* 43 Colo., 482, 490, 96 Pac., 560, 24 L. R. A. (N. S.), 91, 127 Am. St., 123. The second contract was not a renewal of the first,

but a substitution, whereby the first was discharged. The $50 expressed in the second contract as a consideration and part payment on the purchase price, the testimony shows, was the same $50 which was paid on the first contract. This was equivalent to a return of the consideration of the first contract and a repayment thereof on the second. The second contract very materially changed the first as to the time within which it was to be performed and the interest to be conveyed. The first contract could not possibly remain in existence as a valid contract between the parties after the second was entered into, and, as said in *Paul v. Meservey,* 58 Me., 419, 421:

"When a new contract is inconsistent with, and renders the performance of a former one between the same parties impossible, the former is rescinded, upon the same principle that a subsequent act of the legislature repeals a former act, when the two are inconsistent."

A waiver of performance under the first contract arose, and, as the second contract was literally performed, this would include a waiver of any suit for damages for non-performance thereof, unless it was specifically agreed, at the time, that such subsequent contract should not be so considered.—2 Parsons on Contracts, pp. 837, 838 and 839 (9th ed.). The learned author there says:

"Another sufficient defense is accord and satisfaction; which is substantially another agreement between the parties in satisfaction of the former one; and also an execution of the latter agreement. This is the meaning of the ancient rule, that accord without satisfaction is no bar to an action; and it used to be laid down in the earlier books with great exactness, that the execution of the accord must be complete and perfect. So, indeed, it must be now, except where the new promise itself is, by the accord or agreement, the satisfaction for the debt or broken contract. The party holding the claim may agree to take a new promise of the other in satisfaction of it;

or he may agree to receive a new undertaking when the same shall be executed, as a satisfaction. In either case he will be held to his bargain, and only to that. Whether the new promise (*p. 682) shall have by itself the effect of satisfying the original claim, must be determined by the construction of the new agreement (*p. 683). Generally, but not universally, if the new promise be founded upon a new consideration, and is clearly binding on the original promisor, this is a satisfaction of the former claim; and otherwise it is no satisfaction. But even a promise, which would not itself be a satisfaction, may, if it be fully performed, at the right time and in the right way (and not merely tendered) become then a satisfaction."

Beshoar v. Robards, 8 Colo. App., 173, 45 Pac., 280; *Munford v. Wilson,* 15 Mo., 372; *S. & H. Howard v. Wilmington & Susquehanna R. Co.,* 1 Gill (Md.), 311. In the latter case the court said:

"The legal presumption of a merger, as where two contracts are successively entered into upon the same subject matter, is not to be repelled by evidence of the silence of one party, but assent of parties must be averred and proved, to prevent such presumption from operating."

Plaintiff seeks to avoid this situation by the claim that his agent exceeded his authority in making the second contract with the defendant, claiming that he only authorized the agent to purchase the co-owner's interest, and did not authorize him to make any other or further contract with the defendant. This claim is overthrown by the testimony of the agent that he had no instructions to sign the second contract "any further than to get the property, and that was the only way I saw for it," and by plaintiff's testimony that, after learning from his agent that he had made this second contract, and after the agent turned the second contract over to him, he accepted it, and afterwards acted under it and permitted

the full performance thereof according to its terms, by the sale and conveyance of the property as specified therein; *Farrer v. Caster,* 17 Colo. App., 41, 67 Pac., 171; and by his further testimony that he authorized his agent to make the best bargain he could and to pay the price and close the deal; that the result of his agent's trip to see the two owners was that he had to pay one of them $8,000 for his half and the other $6,550 for his half, and that the property was thereafter received in pursuance of that understanding, and the money was paid on June 14th, which was the date set in the second contract made with the defendant.

As no motion was made by defendant for non-suit, and none for a directed verdict, the error of the lower court consists in the giving of erroneous instructions, and in refusing instructions tendered.

The divergent views of the court and counsel for the defendant may be fully illustrated by one of the instructions given by the court and one of the instructions offered by the defendant, but refused by the court.

The defendant asked the court to give the following, among other instructions, covering his view of the case:

"If the jury find from the evidence in this case that the plaintiff, acting by John S. Settle, Jr., as his agent, made the contract of June 11th, 1909, with the defendant D. J. McKay for the purchase of one-half of the property described in the complaint for $6,550, being one-half the amount mentioned in the first contract, and made another contract with William D. McKay for the other one-half of the property for $8,000, and these contracts were made and entered into before the expiration of the time provided for payment under the first contract, and that the second contracts provided different terms of payment and different times therefor, and that afterwards the amounts provided for by the second contracts were paid and at the time provided for, then you should find that the sale

was made under the second contracts and not under the first contract.

"If the jury so find, then they should further find that the second contracts superseded the first contract, and that the plaintiff cannot recover in this action, and your verdict should be for the defendant."

The court gave the following instruction, over the defendant's objection, showing the court's view:

"The court instructs the jury that a subsequent contract will not operate to extinguish a former one between the same parties, unless it was *expressly* accepted by them for that purpose. The evidence must be clear and satisfactory that such was the intention of the parties. And, in this case, before the alleged contracts made on June 11, 1909, can be considered as a substitution or waiver of the terms and conditions of the contract of May 5, 1909, the jury must find from a preponderance of the evidence that it was *expressly agreed by and between the plaintiff or his duly authorized agent and the defendant that said second contracts should be substituted for or considered as a waiver of the terms and conditions of the said former contract.*"

The instruction given, especially the parts I have put in italics, discloses the view of the court that it must have been *expressly agreed* that the second contract was substituted for the first; the instruction, refused, the view of the defendant's counsel, that, the *mere acts* of the plaintiff in *making* the second contract and *carrying it out* constitute a substitution. Both are equivalent to directing the jury, neither leaving anything for the jury to pass upon. The instruction given by the court was clearly erroneous, because adopting a view of the law in such cases that is not upheld by authority. The general rule is, even in the absence of full performance of the second contract, that the second will be presumed to be a substitution for the first, especially if founded upon a

new consideration, unless it clearly appears to the contrary. If the second is fully performed, the presumption becomes conclusive. The plaintiff testified that the second contracts made in this case were fully performed.

In 2 Parsons on Contracts, *supra,* the author says:

"But even a promise, which would not itself be a satisfaction, may, if it be fully performed, at the right time and in the right way (and not merely tendered) become then a satisfaction."

In *Howard v. Wilmington, Etc., R. Co., supra,* the court said:

"The legal presumption of a merger, as where two contracts are successively entered into upon the same subject matter, is not to be repelled by evidence of the silence of one party, but assent of parties must be averred and proved, to prevent such presumption from operating."

"A contract is the result of agreement, so an agreement may put an end to a contract. Therefore, a contract may be discharged at any time before the performance is due, by a new agreement with the effect of altering the terms of the original agreement or of rescinding it altogether; and a claim under the original contract may then be met by the new agreement, so far as the latter operates to alter or rescind the former."—9 Cyc., 593.

"One written contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject-matter. If agreements be made between the same parties concerning the same matter, and the terms of the later are inconsistent with those of the former so that they cannot subsist together, the later will be construed to discharge the former. But where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear. A

new contract with reference to the subject-matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto. Where a new contract is inconsistent with the continuance of the former one, and only provides a new mode of discharging the same, it has no effect unless or until it is performed."—9 Cyc., 595-6.

That the contrary of the rule expressed in the instruction given is the true rule more clearly appears from the last sentence in the following from an opinion by Breese, J., in the case of *Stow v. Russell*, 36 Ill., 29, where, in deciding whether a second contract for the sale of real estate was a revivor, renewal, extension of a former one, or a new one, he said:

"The plaintiff insists the August contract was not a new contract, but merely an extension of the contract of 1846. It may not be very material which it is; we are inclined to think, however, from the circumstances attending the transaction, and from the transaction itself, the old contract was thrown aside, and a new one made on a different basis. * * *

"The price to be paid for the lot was greater under the new than under the old contract. It has, too, the most stringent stipulations, and it does not contain the slightest allusion or reference to any prior contract. There is not the least intimation in it that it was designed as a revival, or as an extension of the contract of 1846, for any purpose or for any new consideration. In all its aspects and features, it seems to be an entire new contract for a larger price, and with the stipulation that the covenants to be performed by the plaintiff are expressly made a condition precedent to any performance by Russell, and

time is made of the essence of the condition. If it had been intended to revive and extend the old contract, it is natural to suppose, some reference to it, or some intimation to that effect, would be found in the contract actually made."

The same appears from the last sentence of the following quotation from *Rogers v. Rogers,* 139 Mass., 440, 1 N. E., 122, where it is said:

"Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intention of the parties, to be ascertained from their correspondence and conduct.—*Peck v. Requa,* 13 Gray, 407; *Munroe v. Perkins,* 9 Pick., 298, 20 Am. Dec., 425; *Holmes v. Doane,* 9 Cush., 135; *Stearns v. Hall, Id.,* 31; *Cummings v. Arnold,* 3 Metc., 486, 37 Am. Dec., 155; *Cooke v. Murphy,* 70 Ill., 96; *Lawrence v. Davey,* 28 Vt., 264; *Stewart v. Keteltas,* 36 N. Y., 388; *Moore v. Locomotive Works,* 14 Mich., 266.

"If we assume that the original agreement was sufficiently definite to constitute a valid contract, the parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that a new contract was not intended to be a discharge of the breach. As to the orders given before October 14th, which the defendant had refused to fill if the new contract by its terms covered those, we think the same rule holds. If the parties agreed that these orders should be filled at the prices stipulated for in the new contract, without considering whether the new contract would of itself be a discharge of these partial breaches, performance of the new agreement would operate as a discharge, or an accord and sat-

isfaction, unless it appeared that such was not the intention of the parties."

It is very clear from the foregoing authorities that the court erred in giving to the jury the instruction aforesaid; in fact, the court would have been fully justified in directing the verdict for the defendant. The instruction offered by the defendant, although not in all respects pertinent, should have been given, in some form, as well as one or two other instructions offered, equivalent to a directed verdict. The defendant pleaded the second contracts, and the plaintiff testified they were fully performed; this destroyed any right of action on the first.

The parties intended by the making of the second contract to disregard and discharge the first, as shown by the testimony. The plaintiff, himself, testified that the property was sold and the money paid, the deed executed and delivered at the time and place, and under the terms of the second contract, prior to the date the first was to have been fulfilled, and it seems absurd that the plaintiff should now attempt to avoid the effect of this second agreement and the subsequent performance thereof, and bring suit upon a contract the full performance of which by the defendant he absolutely prevented by the making and the fulfillment of the second. The second contract was substituted for and discharged the first, and "no action lies upon a contract which has been superseded by the substitution of a different contract."—9 Cyc., 716.

It is unnecessary, therefore, to discuss the question of damages, or the measure thereof, in this action, or the point raised by the appellee, that the defendant's second defense did not constitute a good defense because it did not allege that Settle was acting as agent of the plaintiff in making the second contract. However, the defendant alleged in the first defense of his answer that—"plaintiff or some other person bought said property" at the time the second contracts were made; and, in the second de-

fense, that—"by and in pursuance with the terms and provisions of these last mentioned contracts, and no other, the said property was sold and the said Settle, or plaintiff, or someone represented by them, became the purchasers of said property and paid therefor the full sum mentioned in said contracts of June 11th, 1909; that all the terms and conditions of said contracts of June 11th, 1909, were fully carried out and performed by this defendant and the other parties thereto." Plaintiff, in his replication, admits the agent signed the second contracts, and, in his testimony, admits that the sale was completed June 14th, in pursuance of the understanding or the result of the agent's trip to see the co-owners at the time the two contracts were made. The agent testified that—"I had no instructions from Mr. Fleming to sign any second contract with these men, *any further than to get the property, and that was the only way I saw for it.*"

Reversed, and the lower court directed to dismiss the case, with costs.

HURLBUT, J., having been of counsel, does not participate.

[No. 3689.]

JOHNSON v. GIBSON.

1. TAX TITLE—*Void Deed.* A treasurer's deed reciting the sale of several non-contiguous tracts *en masse* for a gross sum; that the lands were stricken off to the county on the first day of the sale; and that the certificate of purchase was assigned by the county clerk more than three years after the date of the sale is void.

So where, the deed reciting a sale to the county it fails to show by what officer the certificate was assigned.

2. —— *Amended Deed—Construction.* Where an amended deed by the treasurer is offered in connection with the original, the two are construed together, and where the original recites a sale to the county, and an assignment of the certificate by the county clerk, more than three years after the date of the sale, and nothing to the contrary appears in the amended deed, both are void.

3. LIMITATIONS—*Color of Title—Payment of Taxes.* One claiming unoccupied lands under a treasurer's deed must, to avail himself of the statute (Rev. Stat., sec. 4090), show seven years' payment of taxes subsequent to the record of his deed, and before the commencement of an action by the owner of the paramount title.

4. QUIETING TITLE—*Plaintiff's Title—Objections to,* from a defendant showing no title, are disregarded.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

KING, J., delivered the opinion of the court.

This is a controversy over the title to several quarter sections of land located in Kiowa county, Colorado. On February 17th, 1909, appellant, as plaintiff, commenced his action to quiet title, making the usual allegations under section 255 of the civil code. Plaintiff claimed title by virtue of two tax deeds, supplemented by the alleged payment of taxes for seven successive years under claim and color of title made in good faith to vacant and unoccupied land.

1. The first tax deed offered in evidence was executed by the treasurer of said county August 9th, 1902, and recorded on the same day, and was offered as color of title only. This deed recited a sale of several non-contiguous tracts of land *en masse* for a gross sum; that the lands were stricken off to the county on the first day of the sale, to-wit, November 29th, 1898, and that the certificate of purchase issued therefor was assigned by the county clerk more than three years after the date of the sale and issuance of said certificate. For these reasons the deed was void.

2. Less than seven years elapsed between the time said tax deed was issued and recorded and the commence-

ment of the suit, and much less than seven years between the first payment of taxes after the recording of said deed and the commencement of the suit, for either of which reasons the seven-year statute of limitations invoked does not operate as a bar in plaintiff's behalf.

3. The second treasurer's deed, which is called an amended or correction deed of the first, was executed November 30th, 1909, and recorded December 31st of the same year, long after the suit was begun. Objection to the introduction of this deed was sustained by the court for the reason given that the same was dated and recorded after the commencement of the suit. This action of the court is assigned as prejudicial error. It is not necessary to decide at this time whether the reason given by the court was good. The two tax deeds offered by the plaintiff were based upon one and the same sale and assignment of certificate. As heretofore stated, the first showed upon its face that the county clerk assigned the tax sale certificate of purchase more than three years after its date. Both deeds having been offered by the plaintiff, they will be construed together, and nothing appearing in the second to show that the certificate upon which it was issued was not assigned by the county clerk as recited in the first deed, those recitations furnish the only authority upon which the second deed was based, and make it likewise void.—*Empire Ranch & Cattle Co. v. Howell,* 23 Colo. App., 265, 129 Pac., 245; *Empire Ranch & Cattle Co. v. Neikirk, ibid.,* p. 392, 128 Pac., 468. Moreover, it was held by this court in the last case cited that a tax deed which fails to designate the officer by whom the assignment of the certificate of purchase was made, is void. The second tax deed seems to have been artfully worded for the purpose of concealing the fatal defects appearing upon the face of the deed it was made to correct, rather than to speak the truth; but we think the negative showing of the second cannot prevail against

the fatal affirmative recitals of the first, when both deeds are offered together.

4. Defendant deraigned title by *mesne* conveyances from the patentee owner, in part through trustee's deeds executed pursuant to sale under deeds of trust. To the introduction of these deeds by the defendant, plaintiff objected for reasons which have been repeatedly held by this court not available to an adverse claimant under tax title. Furthermore, plaintiff having shown no title in himself could make no objections to defendant's title. In *Empire Ranch & Cattle Co. v. Bender,* 49 Colo., 522, 113 Pac., 494, the supreme court, speaking by Mr. Justice Bailey, said: "The moment defendant's alleged adverse title failed, as it did when it offered no further interest in the cause, and could raise no other issue. * * * When the defendant failed to establish its alleged adverse title it was, in effect, out of court. * * * It is only because of his adverse interest that a defendant is permitted to question a plaintiff's rights at all." The rule there laid down is opposed to the position of the plaintiff in this case. The judgment quieting title in the defendant is affirmed.

[No. 3691.]

THE EMPIRE RANCH & CATTLE CO. v. PATTERSON.

1. JUDGMENT—*Record Not Accompanied by the Judgment Roll,* is not admissible as evidence of title.

2. EVIDENCE—*Admission in Pleading.* In an action to quiet title the admission of the execution of a treasurer's deed, but with an allegation of its invalidity, does not relieve the party relying upon the deed of the necessity to produce it.

3. LIMITATIONS—*Color of Title—Payment of Taxes.* The statute (Rev. Stat., sec. 4090) is no bar to the action of the paramount owner instituted within seven years next succeeding the first payment of taxes under the adverse claim.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. WILLIAM H. WADLEY, for appellee.

KING, J., delivered the opinion of the court.

Appellee, as plaintiff, brought this action to quiet her title to certain lands in Washington county. The defenses pleaded were, a general denial; paramount title under a treasurer's tax deed; former adjudication quieting title in the defendant; the seven-year statute of limitations. By her reply plaintiff alleged that the tax deed was void on its face, and that the decree purporting to quiet title in the defendant was void for want of jurisdiction.

Plaintiff deraigned title to the land in question by *mesne* conveyances from the United States.

1. Defendant offered in evidence a decree of the county court of said county purporting to quiet its title to said land. Objection to the admission of the same in evidence, because not accompanied by the judgment roll, was properly sustained.—*McLaughlin v. Reichenbach,* 52 Colo., 437, 122 Pac., 47; *Empire Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522; *Terry v. Gibson,* 23 Colo. App., 273, 128 Pac., 1127.

2. Defendant's alleged tax deed was not offered in evidence. As shown by the abstract of the record, there was neither allegation, admission, nor proof of the due execution and acknowledgment of said deed, or of the record thereof. The naked admission by plaintiff of the issuance of the tax deed, coupled with an allegation of its invalidity for matters appearing upon its face, did not obviate the necessity of defendant's offering said deed in evidence if it wished to rely upon the same as

proof of title.—*Empire Co. v. Langley*, 23 Colo. App., 49, 127 Pac., 451.

3. The first payment of taxes under the alleged claim and color of title was made after February 21st, 1901. This suit was commenced within seven years from that date. For that reason the plea of the statute of limitations was not sustained by the evidence.

For the reasons given the judgment quieting title in the plaintiff is affirmed.

[No. 3718.]

BAUM ET AL. v. THE CONCORD LAND & IMPROVEMENT CO.

1. CONTRACTS—*Offer and Acceptance.* The acceptance by one party of the previous offer of another must, to be effectual, be unequivocal and unconditional, and must be made before the offer is withdrawn.

2. —— *Construed.* The defendant being the owner of a section of land, subscribed a writing describing it, giving the acreage, and containing the words, "Terms of sale, one-half cash, balance one and two years. Lowest amount to bind the bargain, $500," agreeing further to furnish an abstract of title, and make a warranty deed, etc. These provisions were followed by authority to the plaintiffs to sell the land, fixing the commission, and a statement that plaintiffs would "use their best efforts, at their own expense, to dispose of said land." The paper was not signed by plaintiffs. *Held* in the nature of an employment, rather than a contract of sale.

Later, plaintiffs transmitted to defendant a telegraphic message as follows: "Your terms of trade accepted. Send abstracts." Confirming this telegram plaintiffs wrote, * * * "We take the entire section at $27 per acre net to you; you accept the 172 acres of Arkansas land at $30 per acre * * * and we pay you $5,000 cash at the time of the transfer." *Held* not an acceptance of the terms offered in the writing, and evidence that plaintiffs were not acting thereunder, but in pursuance of some negotiation subsequent thereto.

3. SPECIFIC PERFORMANCE—*Indefinite Contract.* A paper referring to the sale of lands, but expressing no consideration, indefinite as to the purchaser, as to the time of payment of deferred installments of the purchase money, containing no express agreement to sell, and no agreement at all by any one to purchase, will not be specifically enforced.

Appeal from Conejos District Court. HON. CHARLES C. HOLBROOK, Judge.

MESSRS. CORLETT & CORLETT, for appellants.

MR. JESSE STEPHENSON, for appellee.

MORGAN, J.

This is an appeal from a judgment against the plaintiffs in an action for the specific performance of a contract. The judgment should be affirmed.

The plaintiffs sued for the specific performance of a contract made in September, 1909, in substance as follows: Monte Vista, Colorado, ..., 19.. Sec. 17, Tp. 38, R. 9, Conejos county. Title stands in name of Concord Land & Improvement Co. Number of acres, 640. Lowest net price $25 (per acre). Terms of sale, one-half cash, balance one to two years. Lowest amount to bind the bargain $500. That defendant agrees to furnish abstract and make a warranty deed to plaintiffs or to whom they may direct; that defendant places the land in plaintiffs' hands, they to negotiate a sale so as to net defendant the price stated above, for which defendant agrees to allow all above said net price as a commission when a sale is effected; property to be left in plaintiffs' hands and contract to remain in full force until plaintiffs should receive notice that the property is withdrawn from the market, and, upon receipt of such notice by plaintiffs, the contract to become null and void and both parties released from further obligations. Plaintiffs pledge themselves to use their best efforts, at their own expense, to dispose of the land. Signed by defendant only. The complaint also contains allegations of a subsequent parol modification hereinafter referred to.

This contract is more in the nature of an employment of the plaintiffs, as agents, to sell the land for a commission, than a contract for the sale thereof. There is noth-

ing in the contract that would tend to make it a contract of sale, except that defendant agrees to make a warranty deed to plaintiffs or to whom they may direct. This provision is in harmony with a contract of employment, and does not convert it into a contract for the sale of land, and the alleged modifications do not materially assist in such conversion.

It is not such a contract for the sale of land as would admit of a suit for specific performance thereof.

"The specific performance of a contract is its actual execution according to its stipulations and terms; and is contrasted with damages or compensation for the non-execution of the contract. Such actual execution is enforced, under the equitable jurisdiction vested in the courts, by directing the party in default to do the very thing which he contracts to do."—Fry on Specific Performance, sec. 3.

Courts of equity have been slow to enforce specific performance, in face of the right to sue at common law for damages for the breach of a contract.

This contract is without date or consideration, uncertain and indefinite as to the purchaser, and as to the time and security of the balance of the purchase price; the plaintiffs do not agree to buy and the defendant does not specifically agree to sell; the names, the price and terms upon which the plaintiffs might sell it, as agents of the defendant, alone are given, with the possible susceptible interpretation that plaintiffs could accept the proposal therein contained, and buy it themselves.

Waterman on Specific Performance of Contracts says, in sec. 152:

"Considerations as to the certainty of a contract sought to be enforced arise in a suit for specific performance which do not present themselves in an action at law for damages occasioned by a breach."

"Sec. 157. If the language of the contract is con-

tradictory, or there are two different agreements in relation to the same subject matter, specific performance will in general be refused."

"Sec. 186. Contracts which are voluntary, or where there is no consideration on the part of him who seeks performance, will not be specifically enforced, although under seal, whether the contract be in the form of an agreement, a covenant, or a settlement."

It has been held by our supreme court that a contract of this character must be based upon a consideration before an action can be maintained thereupon for a specific performance thereof.—*Rude v. Levy,* 43 Colo., 482, 487, 96 Pac., 560, 127 Am. St., 123; *Winter v. Goebner,* 2 Colo. App., 259, 261, 30 Pac., 51.

In *Rude v. Levy, supra,* the court said:

"The writing upon which this action for specific performance is based was not signed by plaintiff and did not at its execution possess the elements of a binding contract. It was, on the contrary, as named by the parties themselves, a mere 'option to purchase.' According to its terms there was nothing obligatory upon plaintiff, unless, at a future time, he elected to accept and perform. And even after such election, the only penalty for nonperformance would be a forfeiture of the money, if any, previously paid. Moreover, there was practically no consideration for the option. The recital of $1 as paid is the usual provision inserted in such instruments as a matter of form, and even if this sum were actually advanced, it would be merely nominal. It would not, alone, constitute the 'proper' or 'fair' consideration usually considered essential to a suit for specific performance."

Also Pomeroy on Specific Performance, sec. 57, p. 79.

Assuming, but not admitting, that this brings this contract within that species referred to by Mr. Pomeroy, *supra,* in the following excerpt from sec. 169, p. 235—

"Among the examples of this species are those con-

tracts by which the party, upon whom alone an obligation arising from the express stipulations rests, covenants or promises to do or to forbear from some specified act upon the request of the other, and those by which the party making an offer, covenants or promises to do or to omit some act upon the assent or acceptance of the person to whom the offer is addressed, and those in which the party confers an *option* upon the other;"—

nevertheless, the assent or acceptance in this case was not an assent to, or an acceptance of, the terms of the contract as originally written or the alleged modification.

Plaintiff sent a telegram to defendant, and a letter confirming it, accepting the offer contained in the contract as modified. The telegram was as follows:

"Your terms on trade of Section Seventeen accepted. Send abstracts."

The letter confirming the telegram says:

"We wired you yesterday that 'your terms on trade of section seventeen accepted. Send abstracts.' We understand that your terms to be that we are to take the entire section seventeen at $27 per acre, net to you; that you will accept the 172 acres of Arkansas timber land at $30 per acre, providing the abstracts are satisfactory and that we are to pay you $5,000 cash at the time of transfer in addition to the timber land. * * *

"In making this trade on section seventeen, we are compelled to take the northwest quarter ourselves and take our chances on selling it a little later on."

This telegram and letter shows no acceptance of the terms of the contract sued upon, as modified or otherwise. The trade for Arkansas land and the prices named are entirely foreign to any of the terms of the contract alleged. This correspondence further shows that plaintiffs were not then acting under any such contract as the one alleged, but upon some kind of negotiations subsequent thereto.

The evidence of plaintiffs, however, discloses that Mr. Godfrey, representing defendant, came out to Monte Vista pursuant to the telegram and letter, but refused to take the Arkansas land in trade, because of a defect in the title, and, thereupon, plaintiffs both testify to negotiations with Godfrey to the effect that plaintiffs would buy all of said section seventeen themselves, except what they had succeeded in selling to some Nebraska parties, and pay one-fourth cash and balance in four equal payments in one, two, three and four years. This was foreign to any contract made prior to that time, and plaintiffs do not testify that such negotiations were made as a modification of any prior contract, although the contract described in the complaint was made a month before that time. Mr. Baum does testify as follows:

"We said to Mr. Godfrey we were willing to complete this deal along the lines of the contract, that as he had agreed, with the exceptions that we should pay him more money than what the option called for in the beginning, provided that he would accept these mortgages back from these other parties in Nebraska to whom we had already sold certain parts of this land and received the money and had it deposited in the bank at Tecumseh, Nebraska; to which he agreed. * * * We told Mr. Godfrey we would make these payments in one, two, three and four years, and he agreed to it.

"I told Mr. Godfrey (defendant's representative) that we had sold these parcels of this Section 17 and it was necessary to continue with it to complete this deal we were making on the entire section. I showed him the contract—Mr. Godfrey said that he would write a contract of sale covering this section 17 under the terms of the contract, $24, and accordingly he offered to close this deal on the lines of the contract, $24, and accordingly I was surprised that he went away without writing the contract which he had agreed to write. After he knew of the

sale of the three eighties he agreed to write a contract for section 17 all of it at $24 an acre, $25, they would allow us $1 an acre commission and all over that we received. The terms was to have been one-fourth and the balance in one, two, three and four years."

Mr. Dowdell, the other plaintiff, testifies:

"In order to clear up the title to section 17; or timber land in Arkansas, Mr. Godfrey agreed to accept a note without interest. After that contract was written I submitted it to Mr. Godfrey. * * * Mr. Godfrey proposed that we take section 17 at $24 per acre, 25 per cent cash, 25 per cent in one year, 25 per cent in two years, three years and four years. We told him we would accept it; it was perfectly acceptable to Mr. Godfrey and he further said that he would have a contract written. The next day he did not have it written, claiming that Mr. Stephenson was busy.

"I did not see anything more of him until Sunday, when he was about to take the train leaving Monte Vista. Mr. Baum and I urged him to prepare the contract on section 17 at $24 an acre; 25 per cent cash and the balance in four equal payments at 6 per cent, which he said he would do as quick as he got home, but he never done it. * * *

"We exhibited contracts to Mr. Godfrey that we had made with the Nebraska people and explained to him the dates of the payments and about the money advanced in the bank and he accepted the $1,100 that was deposited there and it was satisfactory to him."

These negotiations were in the latter part of November, 1909. Soon thereafter, plaintiffs sent to defendant a contract purporting to comprise these negotiations with Godfrey, which required defendant to accept a mortgage on only a part of the land for the balance of the purchase price; and Mr. Dowdell testified that this was according to the negotiations aforesaid. Defendant refused to sign

it, and on December 27, 1909, notified plaintiffs that the land was withdrawn from the market.

Plaintiffs rely upon these negotiations with Mr. Godfrey as the basis for the modifications of the original contract alleged in the complaint. These negotiations were in the nature of a new agreement, on the part of plaintiffs, to buy part of the land themselves, and sell the rest of it to Nebraska parties. Anyway, the negotiations resulted in nothing more than Mr. Godfrey's agreeing to draw up a written contract concerning the deal, which he did not do, together with defendant's later refusal to sign one prepared by plaintiffs; and the contract prepared by plaintiffs and sent to defendant was not according to the modifications alleged.

Plaintiffs, afterwards, however, in January, 1910, did go to Indiana and tender to defendant one-fourth of the full price of the entire section seventeen, together with notes and mortgages for the balance, according to the modifications of the contract as alleged in the complaint; but this was rejected, and it was made after the land was withdrawn from the market, and, furthermore, not in accordance with any subsequent modifications, nor with any agreement established by the testimony.

It is firmly settled law that assent and acceptance, in instances such as this, must not vary or depart from the terms of the option, either in words or effect, nor amount to a substitute or counter-proposition.

"In these cases there is no assent, and no contract. The respondent is at liberty to accept wholly; or to reject wholly; but one of these things he must do; for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer. The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected, again reply, accepting generally, and upon this acceptance claim the right of holding the other

party to his first offer."—1 Parsons on Contracts, p. 516, *p. 477 (9th ed.).

This rule is distinctly affirmed and illustrated in *Salomon v. Webster,* 4 Colo., 353; *Davis v. Thomas,* 28 Colo., 303, 64 Pac., 187; *Talcott v. Mastin,* 20 Colo. App., 488, 79 Pac., 973.

If the last acceptance and tender made by plaintiffs had been in exact accordance with the terms of the alleged contract and modification, it comes precisely within the acceptance defined in the foregoing quotation from Parsons, *supra,* because it was made after propositions and counter-propositions had been made with no result, and then came as a general acceptance of the modified contract sued upon, after the property had been withdrawn from the market as provided in the original contract.

"In order that an acceptance may be operative, it must be plain, unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party, and that without unreasonable delay."—Fry on Specific Performance, sec. 284.

The same author, in sec. 289, says the introduction of a term in the acceptance which is not in the proposal is a variance which prevents their constituting a contract.

The original contract, without modification, was without consideration, and the modification alleged was never proved, because the acceptance first made was not in conformity with the modification alleged, and the acceptance and tender last made was not pursuant to any completed agreement, was rejected, and came after the property was withdrawn from the market as provided in the contract, whereby both parties were released from further obligations by the terms thereof.

Judgment Affirmed.

[No. 3855.]

KOCH V. THE CITY AND COUNTY OF DENVER.

1. EVIDENCE—*Judicial Notice*, taken, that one riding a bicycle at three miles an hour has complete control of the wheel; that it can be stopped at will, or turned to right or left, and the rider dismount without danger of a fall, and that one so riding may pass over an ordinary depression of three or four inches in depth, and eighteen inches in length, without material disturbance of wheel or rider.

2. MUNICIPAL CORPORATIONS—*Duty as to Maintenance of Streets.* A city is not required to maintain its streets in perfect condition, but only in a condition reasonably safe for passage.

The evidence held insufficient to charge the city with neglect of its duty.

3. TRIAL—*The Order of Evidence*, is in the discretion of the court. Held proper to elicit from an officer of defendant, or re-examination, an admission of the plaintiff, without laying any foundation, *e. g.*, by an examination as to time, place, and persons present.

4. APPEALS—*Harmless Error.* Where the jury are properly instructed upon all material questions involved in the action, and substantial justice is accomplished, the refusal of instructions prayed by the defeated party will be disregarded.

5. CONTRIBUTORY NEGLIGENCE—*In Any Degree*, bars the plaintiffs' action.

An instruction that if the conduct of plaintiff contributed "in any degree" to the injury complained of, there could be no recovery, approved, though it was said that the words quoted might well have been omitted.

Error to Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

Mr. T. J. O'DONNELL, Mr. JOHN W. GRAHAM and Mr. E. H. PARK, for plaintiff in error.

Mr. H. A. LINDSLEY, Mr. T. R. WOODROW and Mr. J. A. MARSH, for defendant in error.

BELL, J.

During the month of August, 1905, the Denver & Pueblo Construction Co., under contract with the city and

county of Denver, defendant in error herein, was engaged in grading and curbing a number of streets in said city, including South Tenth street. The work, during this month, consisted in plowing the streets to a depth of from six to twenty inches and smoothing the surface thereof with bladed machines, after the excess earth was removed, so as to establish proper grades and foundations for a finished surface of three inches of disintegrated granite. The plowing and grading left the earth soft in some places, but put the streets in a passable condition for travel, although certain holes or depressions of from two to four inches deep were produced therein, by reason of traffic and a subsidence of the soft earth. The work of plowing, grading and curbing South Tenth street, between West Tenth and West Eleventh avenues, was completed some time about the middle of August, 1905, and was left in the condition as above described because of the inability of the contractor to obtain the necessary finishing material. During the course of the work the contractor maintained a watchman and red lights throughout the district in which it was operating, which included South Tenth street above mentioned. The contractor suspended operations and withdrew from said district on or about the 15th day of December, 1905, for lack of necessary finishing material and on account of the frozen condition of the ground. During the course of the operation the work was in charge of Mr. George M. Post, an assistant engineer of the Board of Public Works of said city, for defendant in error, Mr. Thomas J. Tully, vice president of the Denver & Pueblo Construction Co., for the contractor, and Mr. J. J. Noonan, sub-contractor. Mr. Post, representing the city, and Mr. Tully, representing the contractor, were in the district every day during the course of the operation, and went over the street in question herein about December 15th, 1905, after the work thereon had been suspended, and testified that it was

then in a reasonably safe state of repair for travel. About 11:30 p. m. of December 30th, 1905, Fred W. Koch, plaintiff in error herein, while riding to his home on a bicycle at the rate of three miles an hour, fell therefrom at a point about 100 feet north of West Tenth avenue and near the center of said South Tenth street, between West Tenth and West Eleventh avenues, and sustained a painful injury to his arm, from which he was still suffering at the time of the trial of this case. In his amended complaint he alleges that, at the time of the accident he was using due care and caution, and that the accident occurred by reason of the negligence of the defendant in error in knowingly permitting a hole or excavation to be or remain in said street, and wholly and negligently failing to place any light or lights there to show where said hole or excavation was located, and, by reason of said negligence on the part of the defendant in error, he suffered damages in a large sum. The defendant in error, in its answer, denies that it negligently or knowingly permitted any defect in said Tenth street, or was guilty of negligence in any manner, and alleges that if the plaintiff in error did meet with or suffer any such injury, the same was caused wholly through his own fault and negligence, and was not the result of any fault or negligence on the part of said defendant in error. A replication was filed denying the allegations contained in the second defense. The case was tried to a jury in the district court, and resulted in a verdict for defendant in error, upon which judgment was rendered, and is now before us on a writ of error. The evidence shows that the plaintiff in error resided at 903 South Tenth street in said city, within one block of the alleged hole or excavation; that he passed the place of accident every day and every night in going to and from his saloon, located on California street; that he was familiar with the condition of the street and knew of a depression therein about three feet east of the one com-

plained of, but did not know of the one into which he rode, which is the alleged cause of the accident, until he encountered it that night; that, some time in October, 1905, about two months previous to the accident, he informed Mr. Hunter, city engineer and member of the Board of Public Works of said city, of the general bad condition of the street, and suggested that he, Hunter, should have the contractor make the necessary repairs. Harry M. Clapp, the only witness for the plaintiff in error, stated that he could not testify as to any particular hole, or to any particular part of the block, nor could he describe any specific defect therein. When asked if there were any holes in West Tenth street near West Tenth avenue, he testified as follows:

"Well, there was through the block there. I could not say exactly whether they were right near West Tenth avenue or not, but in the block generally, in many instances and in many places, but I would not generalize right at that point, because I do not remember."

The testimony of the witness Clapp is a mass of general conclusions, too indefinite to aid the court or jury in any manner.

At the point in the street where the alleged accident occurred there were three depressions, according to the testimony of the plaintiff in error, and only two according to the testimony of George E. Randolph, president of the Board of Public Works of the city, who made a special examination of the grounds soon after the accident. Plaintiff in error testified that he knew there was a hole in the street about three feet long, one and one-half feet wide and from five to eight inches deep, and, in trying to avoid this hole, he rode into a second hole about three feet to the west, and about two feet further south on the street, which was about eighteen inches long, eight to ten inches wide and three or four inches deep; that the third hole was smaller than either of the other two, was only one or

two inches deep, and nearer the curb; that he did not know of the presence of the second hole, which, he contends, caused the accident, and that when the front wheel of his bicycle went into the hole, he was thrown off, and he and his bicycle fell sidewise. When asked how he was thrown off he said:

"By striking the hole I guess, I don't know."

He further testified that he never rode over the street again, and there is no evidence before us that he ever saw it after the accident. Mr. Randolph, president of the Board of Public Works, secured from the plaintiff in error a description of the alleged defects where it was said the accident occurred, and officially visited and inspected the same, some time after the accident, and testified as follows:

"I looked around carefully to see what could be the basis of the claim, and the only things that I saw were two depressions, might be called depressions, one nearer the curb and one nearer the middle of the street. The first one perhaps three feet in diameter and the one in the middle of the street larger. I should think both of them possible three inches at the deepest, down below the ordinary surface of the street and running to nothing at the outer edge of each circle. * * * and from there I went back to Mr. Koch and asked again whether the condition of the street was the same now as it was then, and he said that it was; that it was in the same condition when I saw it as it was when the accident occurred."

Plaintiff in error, in rebuttal, gave his version of his conversation with Randolph as follows:

"He says to me, 'Is the street in the same condition now that it was then?' I says, 'No, I think that has been somewhat filled up now. Some sand blowed in.' "

There seems to be no doubt that both parties to this action knew of the general condition of South Tenth street at the time of the alleged accident, but neither

knew of the so-called hole or depression which is alleged to have caused the accident. Koch testified that "It looked like it sunk in from the water pipes," and was not present when he rode by the place that morning, but on cross-examination admitted that it might possibly have been there without his knowledge. He also testified that there was a city street light within 100 feet of the place of the accident, and frankly stated that he did not know whether the ground was hard or soft within the depression, though, he said, it was a cold night, and the ground was generally frozen hard, and guessed he was thrown off by his wheel striking the hole, but that he did not know. It is difficult to perceive how a depression such as was described by him or by the president of the Board of Public Works could be the proximate cause of the injury, riding, as he was, with his wheel properly lighted, at the rate of three miles an hour, which was his pace according to his testimony. It is a matter of common knowledge that a bicycle, being ridden at a pace of three miles an hour, is under the complete control of the rider, and can be stopped at will, or turned to one side or the other, and the rider step to the ground without danger of falling, and, as well, a matter of common knowledge that such a wheel should pass over a depression such as described without a material disturbance of the wheel or rider.

The city is not required to maintain its streets in a perfect condition, but only in a reasonably safe condition for travel, and we do not find that the plaintiff in error has shown by a preponderance of the evidence, or at all, that South Tenth Street was, at or near the place described in the complaint, other than in a reasonably safe condition for travel at the time of the alleged accident. It is true that the plaintiff in error and his witness Clapp made general statements that the block in which this alleged accident occurred was full of holes, but Clapp

been omitted. It serves no good purpose, as the test is if the negligence of the plaintiff contributed to the injury he cannot recover. The instruction reads in part as follows:

"If you find that the conduct of the plaintiff in any degree contributed to the accident, then the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof, and in such case the plaintiff should not recover."

Not only our courts, but most of the courts of the country have discarded the doctrine of comparative negligence. However, the law writers and the courts very generally state the rule in substance as follows:

"That a plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has *in any degree* contributed to the result complained of."—*Needham v. S. F. & S. J. R. Co.*, 37 Cal., 409-419, citing *Gay v. Winter*, 34 Cal., 153.

The text in Cyc. reads:

"The general rule is that if the negligence of the injured person contributed *in any degree* no recovery can be had. * * * The law will not attempt to measure the degree."—29 Cyc., 511; *Chicago City Railway Co. v. Margaret Canevin*, 72 Ill. App., 84; *Mattimore v. Erie City*, 144 Pa., 24, 22 Atl., 817; *Gonzales v. New York & Harlem R. R. Co.*, 38 N. Y., 440, 98 Am. Dec., 58; *Banning v. Chi. R. I. & P. Ry. Co.*, 89 Ia., 81, 156 N. W., 277; *Murch v. Con. R. Co.*, 29 N. H., 9, 61 Am. Dec., 631; *Potter v. Chi. & N. W. Ry. Co.*, 21 Wis., 372, 94 Am. Dec., 548; *Birmingham Railway, Light & Power Co. v. Bynum*, 139 Ala., 397, 36 So., 736.

Counsel cite many cases to the effect that comparative degrees of negligence submitted to a jury is injurious error. That is conceded by our own supreme court, and even the state of Illinois, where the supreme court unwit-

tingly committed the error of recognizing comparative negligence, and persistently followed its ruling from the time of its decision in *Galena & C. P. U. R. Co. v. Jacobs,* 20 Ill., 478, wherein it departed from the current of authorities, including its own earlier decisions, up to the time of its decision in *Calumet Iron & Steel Co. v. Martin,* 115 Ill., 358, 3 N. E., 456, wherein it repudiated the rule announced in *Galena & C. P. U. R. Co. v. Jacobs, supra,* and the Illinois courts now hold the rule to be:

"That there can be no recovery if plaintiff's negligence contributed *in any degree* to the injury."—*Chicago City Railway Co. v. Margaret Canevin,* 72 Ill. App., 84.

The rule in this state is substantially in harmony with that in the states above cited in support of the general rule. Our supreme court stated the rule as follows:

"Instruction Number 14 recognizes this qualification, and in the main states the rule correctly, but is erroneous in limiting its application to a case where the injured party was guilty of slight negligence only. As before said, the rule of comparative degrees of negligence does not prevail in this state, and it is immaterial what the extent of the injured party's negligence may have been, if it contributed *in any degree* as the proximate cause of the injury, there can be no recovery."—*D. & R. G. R. R. Co. v. Spencer,* 25 Colo., 9-12, 52 Pac., 211.

It will be noticed that the objection in the case above cited was to the court attempting to limit the negligence to *"slight negligence only."*

In *C. & S. Ry. Co. v. Webb,* 36 Colo., 224-230, 85 Pac., 682, the supreme court upheld the refusal of a tendered instruction informing the jury that "unless the evidence showed that the defendant had been guilty of *gross* negligence, in no event could the plaintiff recover," because it said:

"Degrees of negligence, such as slight and gross, does not prevail in this jurisdiction."

In *D. & R. G. R. R. Co. v. Maydole,* 33 Colo., 150-152, 79 Pac., 1023, also cited by counsel for plaintiff in error, the condemned instruction reads:

"If * * * the deceased was also guilty of an equal or nearly equal degree of negligence * * *, then the jury should find for the defendant."

The other authorities from this state cited by counsel involve the same question of comparative degrees of negligence, which, in our opinion, has no application to the case before us.

We feel that substantial justice was administered in the trial court without reversible error, hence the judgment should be and it is hereby affirmed.

[No. 3597.]

EMPIRE RANCH & CATTLE CO. v. HOWELL.

Judgment affirmed on the authority of *Empire Co. v. Howell,* 22 Colo. App., 584.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

MR. R. H. GILMORE, for appellant.

MR. JOHN F. MAIL, for appellee.

KING, J., delivered the opinion of the court.

Action in the nature of ejectment for the possession of the northwest quarter of Section 9, Township 4 south, Range 51 west, Washington County. It is admitted by counsel for appellant that the same questions of law and under conditions and facts substantially the same as were raised and determined in *Empire Ranch & Cattle Co. v. Howell,* 22 Colo. App., 584, 126 Pac., 1096, are presented for determination in this case, and upon the authority of that decision the judgment herein appealed from is affirmed.

[No. 3598.]

EMPIRE RANCH & CATTLE CO. v. HOWELL.

1. TAX TITLES—*Void Deed.* A treasurer's deed showing upon its face that it is founded upon a sale to the county, and an assignment of the certificate of purchase by the county clerk, more than three years after the date of the sale, is void.

2. EJECTMENT—*Plaintiff Recovers Upon the Strength of His Own Title.* Whatever may be the condition of defendant's title, the plaintiff not showing any title in himself has no right to annoy him. And the defendant is at liberty to make objection to any defect in the plaintiff's chain of title, even though he pleads a title derived from a different source, and a title which appears upon its face to be an empty one.

3. TRUST DEED—*Trustee's Deed—Recitations.* In ejectment plaintiff gave in evidence a deed of trust of the land in controversy for securing the payment of a promissory note mentioned therein. He then offered a trustee's deed executed by the trustee named in such deed of trust reciting a deed of trust between the same parties and bearing the same date with that offered in evidence for the security of the same person, but recorded on a different date, and at a different place. It was shown that there was, in fact, a deed of trust corresponding as to date and place of record with that recited in the trustee's deed and purporting to be executed by the same grantor in the deed of trust offered by plaintiff to the same trustee, and to convey the same land, but securing a different sum of money, to a different creditor. *Held* that, *prima facie*, the trustee's deed offered by plaintiff was not executed pursuant to the deed of trust upon which he relied, and, there being no evidence to explain these discrepancies, that plaintiff showed no title.

4. LIMITATIONS—*Void Deed.* One claiming under a treasurer's deed void upon its face cannot avail of the five years' statute of limitations (Rev. Stat., sec. 5733).

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

Judgment reversed in part and affirmed in part.

KING, J., delivered the opinion of the court.

Appellee, as plaintiff, brought his suit to recover

possession of the northeast quarter of Section 17, Township 5 north, Range 50 west, and also the northeast quarter of Section 34, Township 4 north, Range 51 west, based upon his claim of title to said tracts in fee simple. Defendant denied plaintiff's title and right of possession, alleged its ownership of both parcels of land under treasurer's tax deeds, pleaded the short statute of limitations, and payment of taxes for seven successive years under claim and color of title made in good faith to vacant and unoccupied land. Judgment was rendered in favor of plaintiff as to both parcels of land.

It was admitted that plaintiff had title in fee to the northeast quarter of Section 34 above described, unless extinguished by the treasurer's tax deed under which defendant claimed. That deed, however, shows on its face that the certificate of purchase upon which it was based was assigned by the county clerk more than three years after the date of the sale, and for that reason is void.

To establish his *prima facie* title to the northeast quarter of Section 17 aforesaid, plaintiff offered a deed of trust from one Shultz, the patentee, to W. H. Lanning as trustee for the use of Thomas Frahm, to secure payment of a promissory note for the sum of $200 with interest, conveying the land last referred to. Said deed of trust was dated June 1, 1888, recorded June 23rd of the same year at page 220 of book 10; also a trustee's deed which recited a sale under a deed of trust from Shultz to Lanning as trustee for the use of Frahm, securing the same sum, conveying the same land and bearing the same date as the trust deed offered, but recorded October 15th, 1888, in Book 10 at page 303. Over defendant's objection the trustee's deed was admitted in evidence. The recitals of this trustee's deed show, *prima facie,* that it was not pursuant to a foreclosure of the deed of trust offered in evidence; and therefore, without

further showing, the trust deed was not evidence to support the foreclosure. Defendant, for the purpose of showing that the foreclosure was not made pursuant to the deed of trust recorded October 15th, 1888, in Book 10 at page 303, offered in evidence that deed, which disclosed that it was from Shultz to Lanning, for the same land, bearing the same date as the one offered by plaintiff, but given to secure the sum of $50 instead of $200, and for the use of one McKinley instead of Frahm, as in the trust deed offered by plaintiff. This deed showed, *prima facie,* that the trustee's deed offered by plaintiff was not executed under a foreclosure pursuant to said last-named deed of trust. Upon the present showing, plaintiff failed to establish title to the tract of land last named. In *Mulqueen v. Lanning,* 53 Colo., 146, 124 Pac., 577, an action to quiet title, plaintiff in support of his title offered a trustee's deed which recited a trust deed not in evidence. The record did disclose a trust deed between the same parties but for the use of a different person from the one for whose use the deed of trust forming the basis for the trustee's deed was made, and also securing a different sum from that stated in the trustee's deed. There was no evidence to reconcile these discrepancies, and the court held that plaintiff had failed to prove any title whatever. The case cited is authority for the conclusion we have reached. Appellee contends that the defendant, claiming through another and different source of title from plaintiff, has no right to raise objections to the trustee's deed. We know of no reason for so holding, and no authority which so holds under similar circumstances. After defendant's denial of plaintiff's title and right of possession, plaintiff was put upon proof of his own title; and until he had made *prima facie* proof thereof defendant was not required to submit his title deeds for adjudication. The plaintiff, without title, had no right to annoy and harass the defendant, whatever

may have been the condition of its title under the tax deed.—*Daniels v. Case,* 45 Fed., 842; *Empire Ranch & Cattle Co. v. Bender,* 49 Colo., 522, 113 Pac., 494.

The five-year statute of limitations afforded no protection to title claimed under void tax deed, and payment of taxes for the requisite time under claim and color of title made in good faith to vacant and unoccupied lands was not proven.

For the reasons given the judgment in so far as it affects the title to the northeast quarter of Section 34, Township 4 north, Range 51 west, is affirmed; and as to the northeast quarter of Section 17, Township 5 north, Range 50 west, it is reversed, and the cause remanded for further proceedings as to that tract only.

[No. 3614.]

FISHER v. THE MCPHEE & MCGINNITY CO. ET AL.

1. MECHANIC'S LIEN—*Improvements Made by Tenant.* Unless the lease so provides, the landlord cannot be charged with the cost of an improvement made by the tenant, nor can the leased premises be subjected to a lien therefor. The tenant is not the agent of the owner within the meaning of section 1 of the statute (Rev. Stat., sec. 4025).

2. —— *Owner Failing to Give Notice That Premises Are Not Chargeable.* The statute (Rev. Stat., sec. 4029) has the effect to impose a lien upon the tenement for improvements made by the tenant when the landlord fails to give notice to the contrary within five days after he is informed of the intended improvement.

The evidence examined and held to warrant the finding that the owner, by her agent, was informed of the improvement as it proceeded, and failed to give the statutory notice.

3. —— *Pleadings—Burden of Proof.* One seeking to enforce a lien upon leased premises for improvements made at the instance of the tenant, alleging that the landlord had notice of the improvement is not required to go further, and allege or prove that the landlord did not give notice provided for by Rev. Stat., sec. 4029.

Such notice, if given, is matter of defense to be alleged and established by the defendant.

4. —— *Notice to Agent.* Where the general agent of the owner, having full charge of the premises, with authority to let the same and make repairs thereon, has notice of improvements being made by the tenant, such notice charges the owner.

5. —— *Statement of Lien—Service of Copy—Contractor—Sub-Contractor.* One improving leased premises at the instance of the tenant is not a sub-contractor, and is not required to serve a copy of the statement of lien required by Rev. Stat., sec. 4033.

6. EVIDENCE—*Admissions of Agent,* against the interest of the principal, made subsequent to the transaction, are not, in general, admissible to establish the fact admitted.

Otherwise, where the admission is used to contradict the testimony of the agent.

7. APPEALS—*Presumptions.* It will be presumed, the trial being without a jury, that the trial court having received statements of the agent against his principal gave them only such credit as they were entitled to.

Appeal from Denver District Court. HON. JAMES OWEN, Judge.

Mr. L. J. STARK, for appellant.

Mr. THOMAS B. STUART, Mr. CHARLES A. MURRAY and Mr. J. E. McCALL, for appellee Willoughby.

Messrs. BARTELS, BLOOD & BANCROFT, and Mr. RAYMOND J. McPHEE, for the McPhee & McGinnity Company.

KING, J., delivered the opinion of the court.

The McPhee & McGinnity Company, a corporation, one of the appellees, as plaintiff, brought its suit to establish and enforce a mechanic's lien against the property of Rachel L. Fisher, and to obtain personal judgment against said Fisher and one W. B. French. R. S. Willoughby, doing business as The Silver State Electric Company, another lien claimant, was also made a defendant. The judgment was in favor of plaintiff on its complaint, and likewise of Willoughby on his cross-complaint, giving personal judgment for the amount of their claims as against French only, and establishing and

ordering foreclosure of the liens of both plaintiff and Willoughby. Fisher alone appealed.

The complaint alleged, in substance, that defendant Fisher was the owner of a certain lot in Denver, and building thereon, in which a moving-picture show was conducted; that French was lessee of said premises; that while in possession as such lessee, French purchased from plaintiff certain building materials for use, and which were used, in the alteration, addition to and repair of the building on said lot, with the knowledge of the defendant Fisher, and under and by virtue of a contract between French and Fisher, largely in excess of $500; that neither said contract nor any memorandum thereof had been filed in the office of the county clerk and recorder, and that Fisher had not at any time given notice to plaintiff that her interest in said lot and building should not be subject to a lien for said materials so furnished and used, either by serving upon plaintiff written or printed notice to that effect, or posting such notice upon said real estate or building, nor in any other manner; alleged due service upon defendant Fisher, and record of the lien statement.

Willoughby, for cross-complaint, alleged that, doing business under the name of The Silver State Electric Company, he had, at the instance and request of said French, furnished materials and performed labor in placing an electric system in said theatre building. In all other material respects the cross-complaint was, *mutatis mutandis,* the same as plaintiff's complaint. All the allegations of the complaint and cross-complaint, except Fisher's ownership of the lot and building, the recording of the lien statement and service thereof by plaintiff, were put in issue by the answer of appellant.

From the foregoing statement, it will be observed that both the complaint and the cross-complaint seek to establish and enforce liens as against the premises, and

Fisher, the owner thereof, upon two statutory grounds, (1) under the general provisions of the mechanic's lien act, because, as alleged, the owner expressly or impliedly, through a tenant, contracted for the materials furnished and the labor performed; (2) under Section 5 of the Act of 1899, Session Laws 1899, page 261; Section 4029, M. A. S. 1912; Section 4029, R. S. 1908, the contention being that, in the absence of any contract, express or implied, with the owner, nevertheless, the premises are subject to the liens, because the owner, with knowledge that the improvement was being made, did not, as required by that section, notify the claimants that her interest should not be subjected to the liens. No objection was made to the joinder of these causes of action in one count.

There was an entire failure to prove the first statutory ground alleged; there was no contract with the owner, either as to French or the lien claimants. French was not the lessee, but was in possession, and was treated by Fisher as the lessee, or its agent, and the improvements, in the making of which the materials were furnished and the labor bestowed, were made at his instance and request, but without the permission and after the express refusal of the defendant Fisher to grant such permission.

1. Unless so provided by the terms of the lease, the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor for the lessor, within the contemplation of the lien statute. The owner of property cannot be bound nor his property charged with a lien by the unauthorized act of the lessee in having improvements made on the leased property.—*Wilkins v. Abell,* 26 Colo., 462, 58 Pac., 612; *Antlers Park R. M. Co. v. Cunningham,* 29 Colo., 284, 68 Pac., 226; Phillips on Mechanics' Liens, sections 58 and 65; *Hopkins v. Hudson,* 107 Ind., 191, 8 N. E., 91.

2. The act of French in causing the improvements to be made, being wholly unauthorized, it is obvious that neither the plaintiff nor cross-complainant can enforce a lien under the general provisions of the mechanic's lien act, but must rely wholly upon section 5 aforesaid, which, so far as material, is as follows:

"Any building * * * and every structure or other improvement mentioned in the preceding sections of this act, constructed, altered, added to, removed to or repaired, either in whole or in part, upon or in any land, *with the knowledge of the owner* or reputed owner of such land, or of any person having or claiming an interest therein, * * * shall be held to have been erected, constructed, altered, removed, repaired or done at the instance and request of such owner or person, *but so far only as to subject his interest to a lien* therefor as in this section provided; and such interest so owned or claimed shall be subject to any lien given by the provisions of this act, unless such owner or person shall, within five days after he shall have obtained notice of the erection, construction, alteration, removal, addition, repair or other improvement, aforesaid, give notice that his interests shall not be subject to any lien for the same, by serving a written or printed notice to that effect, personally upon all persons performing labor or furnishing skill, materials, machinery or other fixtures therefor, or shall, within five days after he shall have obtained the notice aforesaid, or notice of the intended erection, construction, alteration, removal, addition, repair or other improvement aforesaid, give such notice as aforesaid by posting and keeping posted a written or printed notice to the effect aforesaid, in some conspicuous place upon said land or upon the building or other improvement situate thereon. * * * And provided, further, that the provisions of this section shall not be construed to apply to any owner or person claiming any interest in such

property who shall have contracted for any erection, structure or improvement mentioned in this act."

This section charges land with a lien for the cost of any building constructed thereon or altered, added to or improved, with the knowledge of the owner, if he shall not have contracted therefor, but from which lien so charged he may be relieved by compliance wtih the statutory requirements as to notice. The trial court made special findings of fact, that said alteration, addition to or repair of said building was made by said French with the knowledge of the defendant Fisher, acquired during the progress of the work, and that the materials were furnished and labor performed by the plaintiff and Willoughby with like knowledge, and that she had not at any time given notice that her interests in said land or building would not be subject to a lien for and on account of such improvement. This finding is assigned as error, and it is contended that there is no evidence tending to show that defendant had knowledge that improvements were being made or were made, until their full completion, on or about October 16, 1908. The evidence in support of that finding is meager, and, as read from the record here, unsatisfactory. Defendant Fisher had no personal knowledge of the improvement until long after its completion. If she is charged with such knowledge, it must be because of such information as came to the notice of one McGrew, her agent. He testified positively that he knew nothing of the changes made or contemplated until October 16th, after everything was practically completed, at which time he censured French for doing what he had been forbidden to do. Two witnesses testified that said agent, after the transaction, admitted that he knew materials were being delivered, and that work was going on. The work done consisted of very substantial changes in the building, which were being made during the months of August, September and

October, during which time McGrew was frequently at the building collecting, or attempting to collect, rent, and it is probable that the trial court gave no credit to his statement that he did not see what must have been obvious for so long a period.

Appellant insists that testimony of admissions made by an agent, after the transaction, against the interests of his principal, is not admissible. Generally speaking, this is true, at least when applied to substantive evidence. —*Anthony v. Estabrook,* 1 Colo., 75, 91 Am. Dec., 702; *Edmunds v. Curtis,* 8 Colo., 605, 9 Pac., 793; *Union Coal Co. v. Edman,* 16 Colo., 438, 27 Pac., 1060. But as affecting the credibility of the witness and the weight to be given to his evidence, we think the admission of such statements or admissions not prejudicial error, when taken in connection with the fact that the trial was to the court, as it will be presumed that the court gave to such admissions only such credit as they were entitled to receive, there being other substantive evidence to support the finding. We cannot say that the evidence is wholly insufficient to sustain the finding, and it will not be disturbed.

3. McGrew was general agent of the owner, so far as this property was concerned, having full charge of the premises, authority to make repairs thereon, rent the same, etc., and under this section, his knowledge as to matters affecting the property will be charged to his principal.—*Pacific Lumber Co. v. Wilson,* 6 Calif. App., 561, 92 Pac., 654; *Jefferson v. Leithauser,* 60 Minn., 251, 62 N. W., 277.

4. In further support of the contention that the judgment is erroneous, it is urged by counsel that the appellant was not served with a copy of the lien statement at or prior to the time of filing the same for record. The lien statement of plaintiff was duly served; that of Willoughby was not served. Section 4033, R. S. 1908, 2

M. A. S., 4589, provides, *inter alia,* "in order to preserve a lien for work performed or material furnished by a *sub-contractor,* there must be served upon the owner or reputed owner of the property or his agent, at or before the time of filing with the county clerk or recorder the statement above provided for, a copy of such statement." This contention is based on the assumption that the claimants were sub-contractors. There having been in fact no contract, express or implied, with the owner, there was, as to her, no person sustaining the relation of either contractor or sub-contractor; and therefore, without the aid of Section 5 aforesaid, the materialman or laborer would be remediless. Its provisions were evidently intended to extend the benefits of the lien act so as to cover, and at the same time restrict the application of this section to, just such conditions as are here found, to-wit, where materials are furnished for and labor performed in improving property in the absence of any contract with the owner, but of which he had knowledge. The concluding paragraph of said section makes this intention plain and emphatic. It reads as follows:

"Provided, that the provisions of this section shall not be construed to apply to any owner or person claiming any interest in such property *who shall have contracted* for any erection, construction or improvement mentioned in this act."

The improvement having been made with the knowledge of the owner, who did not contract therefor, this statute, by its own force and vigor, fixes and impresses the relation of principal, or direct contractor as to such materialman or laborer, but for the purpose only of creating, establishing and enforcing the lien; no personal liability attaches to the owner. While we feel that, under all the circumstances, claimants ought not to prevail as against appellant, we are convinced that any other construction and effect than we have here given to section

5 would nullify its plain meaning, and would be opposed to the decision of the supreme court of this state in *Curtis v. Nunns,* 54 Colo., 554, 131 Pac., 403, 404, in which that court, construing another section, held that the actual relation of sub-contractor was there, by force of the statute, changed to that of statutory principal contractor, and for that reason notice or copy of the lien statement was not required to be served. Claimants were not sub-contractors, and therefore failure to serve their statement was not fatal.

It is also urged that judgment cannot be sustained as to the cross-complaint, because there was neither allegation nor proof that the notice of non-liability provided for in section 5 aforesaid was not given by appellant. Having alleged that the improvement was made with the owner's knowledge, it was not necessary to further allege or prove that the owner did not give notice of non-liability. Such notice, if given, is a matter of defense, to be set up and established by the defendant.—*Clark Co. v. Centennial M. Co.,* 22 Colo. App., 174, 183, 123 Pac., 322; *The West Coast Lumber Co. v. Newkirk,* 80 Calif., 275, 22 Pac., 231; *Harlan v. Stufflebeem,* 87 Calif., 508, 25 Pac., 686.

The original opinion filed herein is withdrawn, and judgment affirmed.

Decided April 14, A. D. 1913. Judgment affirmed after rehearing September 15, A. D. 1913.

[No. 3620.]

SHEESLEY ET AL. V. VOORHEES.

1. TAX TITLES—*Tax Deed as Evidence.* A treasurer's deed is not evidence of title unless it affirmatively appears that every step prescribed by the statute was regularly taken.

A deed which fails to show that notice was given by the tax purchaser of his intention to apply for a deed, as required by the statute

(Rev. Stat., sec. 5727), and proof thereof made, or that the assessed valuation was such that notice was not required, is not *prima facie* evidence of title, and is not admissible in evidence without proof of the notice, or that it was not required.

The setting forth of the deed in *haec verba* by the opposing party in his pleadings does not supply the defect of such preliminary proofs.

2. LIMITATIONS—*Five Years' Statute.* A tax deed does not set in motion the five years' statute of limitations (Rev. Stat., sec. 5733) where there is no recitation of notice given of the tax purchaser's intention to apply for his deed, or that the assessed valuation is such that notice is not required.

Appeal from Weld District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. ISHAM R. HOWZE, for appellants.

Mr. JOHN F. MAIL, for appellee.

KING, J., delivered the opinion of the court.

On petition for rehearing:

Plaintiff in this action brought her suit in the nature of ejectment (under Section 266, Civil Code) to recover possession of certain real estate, alleging her title and right of possession, and that defendants wrongfully withheld said premises from the plaintiff, and exercised acts of ownership on and over the same. For answer to this complaint defendants denied plaintiff's title and right of possession, and alleged that they were the owners in fee simple, in possession and entitled to possession of said premises. They also made cross-complaint in which they alleged their ownership in fee and possession of the land described in the complaint; that plaintiff claims some interest therein adverse to the defendants, which was without foundation or right, and asked that plaintiff be required to set out the nature of her title or claim and that the same be adjudged invalid, and that defendants' title be quieted. To this cross-complaint plaintiff an-

swered, denying defendants' ownership and possession, and alleged that she claimed said land and was the owner thereof in fee simple by mesne conveyances under a treasurer's deed executed, acknowledged and recorded, giving the date of execution, the date of record and the book and page in which said deed was recorded, and pleaded the short statute of limitations, to-wit, Mills' Ann. Stats., sec. 3904, Rev. Stats. '08, sec. 5733, as a bar to defendants' cross-complaint. To this answer of plaintiff to their cross-complaint defendants filed replication in which they denied each and every allegation set forth in said answer, and alleged on information and belief that the pretended treasurer's deed referred to in plaintiff's answer was in certain words and figures set forth in full in said replication, including the acknowledgment and date of its record, but giving no book in or page at which the same was recorded; alleged that said deed was void on its face and for divers reasons specifically set forth but not appearing upon the face thereof. Judgment was rendered for plaintiff, and defendants appealed.

1. The case was first and separately tried as an equity case upon defendants' cross-complaint to quiet title, at which time the court granted non-suit as to defendants' cause of action set forth in their cross-complaint, holding that the tax deed set out in defendants' replication was fair on its face, and therefore said five-year statute of limitations barred defendants from introducing evidence to establish the invalidity of the deed for matters not appearing upon its face. Thereafter the cause came on for trial before another judge upon plaintiff's cause of action in ejectment. As the only proof of her title plaintiff offered in evidence a quit-claim deed from Mary E. Grosvenor and two others as sole heirs of Margaret G. Palmer, to Edgar P. Long; quit-claim deed from Edgar P. Long to plaintiff, both said deeds conveying the lands herein in litigation; a court order reciting

the death of said Margaret G. Palmer and settlement of her estate, and that the said Mary E. Grosvenor and the two others named in the quit-claim deed were her sole heirs. It was admitted in the pleadings that M. G. Palmer was the grantee named in the treasurer's tax deed. The tax deed relied on to prove plaintiff's title was not offered in evidence. By agreement of counsel it was stipulated that the title to the land in controversy emanated from the United States, and was thereafter conveyed to the defendants, and so stood at the time of the beginning of this action.

2. Appellants contend that by reason of the failure of appellee to offer the tax deed in evidence, and support it by proof of compliance with certain statutory requisites to its validity, she wholly failed to establish *prima facie* title; while appellee contends that the defendants, by setting out the tax deed *ipsissimis verbis* in their reply, obviated the necessity on the part of plaintiff, not only of offering the deed in evidence in support of her title, but also of the offer of any proof with regard thereto. We think, under the facts of this case and the form of the deed pleaded by defendants, plaintiff's contention cannot be sustained. Before a tax deed can become *prima facie* evidence of title in the courts of this state it must affirmatively appear by the recitals of the deed that every preliminary step to divest the title of the patent owner was regularly taken as prescribed by law.—*Charlton v. Toomey,* 7 Colo. App., 304, 43 Pac., 454; *Empire Co. v. Howell,* 23 Colo. App., 265, 268, 129 Pac., 245. If this rule be adhered to it necessarily follows that this deed, which fails to recite compliance with the provisions of the statute making it obligatory to give notice of intention to take out the deed, and make due proof thereof, as a condition precedent to the power of the treasurer to execute it, or that the assessed valuation of the land was such that notice was not required, is not even *prima facie* evi-

dence of title in the holder, and is not admissible in his behalf without proof of such preliminary step or the condition which makes it unnecessary. Neither the copy of the deed pleaded by defendants for the purpose of showing its invalidity on its face, or *aliunde*, nor any allegation with regard thereto, contained or constituted an admission of compliance with this jurisdictional prerequisite to the power of the treasurer to execute the deed, without which defendants' title could not be divested. And even though the deed be conceded to be fair on its face so as to make it (by virtue of the statute if otherwise admissible) *prima facie* evidence of facts occurring before or at the time of the sale, which we do not decide, nevertheless, it constituted no evidence of the acts which the cash purchaser is required to perform, or the treasurer for him, after the sale and before a deed can be lawfully executed.—*Carnahan v. Sieber Cattle Co.*, 34 Colo., 257, 261, 82 Pac., 592; *Richards v. Beggs*, 31 Colo., 186, 72 Pac., 1077; *Treasury T. M. & R. Co. v. Gregory*, 38 Colo., 212, 88 Pac., 445; *Mitchell v. Trowbridge*, 47 Colo., 6, 8, 105 Pac., 878. This requirement is jurisdictional.—*Crisman v. Johnson*, 23 Colo., 264, 47 Pac., 297, 58 Am. St., 224; *Knox v. Cleveland*, 13 Wis., 245, 255; *Slyfield v. Healy*, 32 Fed., 2. In *Empire Ranch & Cattle Co. v. Langley*, 23 Colo. App., 49, 127 Pac., 451, this court, speaking through Cunningham, J., said: "It is difficult to perceive how a tax deed that has not been offered in evidence at all can be held to constitute *prima facie* evidence of title, unless every prerequisite necessary to constitute it such has been admitted by the opposing party." It is equally difficult to perceive how a defendant who has set out a tax deed *in haec verba* under the claim that it is the deed relied on by the plaintiff as source of title, and for the sole purpose of attacking it, can be held to have admitted its validity or sufficiency to any extent beyond its *prima facie* showing and the

admissions actually made in the pleadings, or to waive the necessity for proof by plaintiff who seeks to use it as a muniment of title, of any unadmitted act the execution of which is a prerequisite to the validity of the deed or its competency as evidence. Because of the absence of allegations, admissions or proof of the notice of intention to take out the treasurer's deed, or of conditions which made the notice unnecessary, we think the plaintiff failed to establish *prima facie* title, and for that reason the judgment cannot be affirmed.

Appellants also contend that the deed, if regarded as offered in evidence, is void on its face, and therefore not sufficient to support the plaintiff's plea of the short statute of limitations. While plaintiff contends that, by this deed, defendants' title derived from the government was extinguished after five years and before the commencement of this action, and relies on decisions of the supreme court in *Williams v. Conroy,* 35 Colo., 117, 83 Pac., 959; *Wood v. McCombe,* 37 Colo., 174, 86 Pac., 319, 119 Am. St., 269; *Halbouer v. Cuenin,* 45 Colo., 507, 101 Pac., 763. We think those cases are not decisive of the instant case in favor of the plaintiff under the facts here shown. In *Williams v. Conroy* it was admitted by both the plaintiff and the defendant that the tax deeds relied upon were regular and fair on their face in all respects; and in neither of the three cases was the question raised or considered that it was not shown by the recitals of the deed, or by evidence *aliunde,* that due notice of intention to take out the deed had not been given, or that the assessed valuation of the land was such as to make it unnecessary. Although the first statute, requiring notice as a condition precedent to the taking out of a tax deed in case the assessed valuation exceeded a certain sum, was in effect at the time the decisions in said three cases were rendered, it is shown by the record in each case that the tax deed there under consideration was executed and

recorded prior to the taking effect of such statute, and for that reason said statutory provision neither had nor could have any bearing, and neither of said cases is in point upon the question here under consideration.

If it be conceded that the tax deed was not void on its face because of any affirmative allegations showing a failure to comply with the statutory prerequisites, nevertheless, for its failure to recite the jurisdictional requirement which goes to the power of the treasurer to issue the deed, it was not *prima facie* evidence of title, and could not set the short statute of limitations in operation.—Black on Tax Titles, sec. 498; *Knox v. Cleveland, supra.* If not held to be void, it must be held to be insufficient for lack of essential proof. The petition for rehearing is denied. But on account of modifications incorporated herein which are deemed justifiable and appropriate under the law and the facts of this case, the former opinion will be withdrawn. The judgment of the trial court is reversed and the cause remanded.

[No. 3675.]

GIBSON v. FOSTER.

1. JUDGMENT—*Misnomer of Defendant.* Where, in judicial proceedings, the defendant is personally served or appears, the omission of, or a variance in, the middle name or initial will be disregarded. But a decree quieting the title to lands, given by default, upon publication of the summons all the proceedings describing the defendant as A. L. Deleplane is without effect as to Albert S. Deleplane.

2. NAMES—*Initials.* The middle name, or the initial thereof, is material as a distinguishing identification of the person. No presumption will be indulged that Albert S. and A. L. are the same person.

Appeal from Kiowa District Court. HON. J. E. RIZER, Judge.

Mr. JOHN F. MAIL, for appellant.

Messrs. CRANE & PATRICK, for appellee.

MORGAN, J.

On rehearing:

Appeal from a judgment of the Kiowa district court for defendant in an action for the possession of three separate tracts of land. Complaint filed February 24, 1909. Defendant recovered a judgment on the strength of a decree of said court, pleaded in defense, quieting his title, and made long prior to this action, in which the plaintiff's immediate grantors were parties, with the exception that one grantor's name, A. S. Deleplane, as to one of the tracts, appears in the judgment roll and in the pleaded decree as A. L. Deleplane; and with the further exception of the plaintiff's grantor of Lots 1 and 2, and the east half of the northwest quarter of Section 7, Township 18, Range 43, who obtained the title, after said decree was made, by a valid tax deed.

An examination of the tax deed aforesaid discloses no defects on its face, and as no evidence was offered or introduced as to any defects without the deed, the court made no error in admitting it as valid. It was, no doubt, an oversight that the court afterwards rendered a judgment for defendant as to all the tracts involved.

Plaintiff's title to the tract conveyed to him by A. S. Deleplane, who received a patent in the name of Albert S. Deleplane, is not affected by said decree, because the decree and the judgment roll including the publication of summons disclose that the name used in every instance is A. L. Deleplane. The variance in the name of this defendant is too great to permit jurisdiction of the person, in this instance, in the absence of any appearance, and of any evidence on the subject, except the decree and the judgment roll, including the affidavit and publication

of summons. Although this is a collateral attack, the decree has no binding effect on plaintiff's title, as the court had no jurisdiction of Deleplane, who held the title when the decree was obtained, and afterwards conveyed to plaintiff.—*Empire R. & C. Co. v. Coldren,* 51 Colo., 117, 122, 117 Pac., 1005.

Courts are cautious in permitting jurisdictions of the person where service is made by publication. The reports of this and other states are replete with decisions construing such statutes, and few disclose greater caution than the recent reports of this court and the supreme court.—*Bloomer v. Cristler,* 22 Colo. App., 238, 240, 123 Pac., 966; *Norris v. Kelsey,* 23 Colo. App., 555, 557, 130 Pac., 1088; *Empire R. & C. Co. v. Coldren, supra; Millage v. Richards,* 52 Colo., 512, 515, 122 Pac., 788.

The middle name or initial in a person's name has become quite material in modern times, especially as a distinguishing identification of the person. Many persons now have the same Christian, or given, name, and the same patronymic, family or surname, and it is by the middle name or initial only, in many instances, that the person may be distinguished or identified in writing.—*Turner v. Gregory,* 151 Mo., 100, 52 S. W., 234; *German National Bank v. National State Bank,* 3 Colo. App., 17, 19, 21, 31 Pac., 122; *S. C.,* 5 Colo. App., 127, 39 Pac., 71; *Wood v. Reynolds,* 7 W. & S. (Pa.), 406; *Bowen v. Mulford,* 10 N. J. L., 230, 232; *Terry v. Sisson,* 125 Mass., 560, 561; *Dutton v. Simmons,* 65 Me., 583, 20 Am. St. Rep., 729; *Esther Hutchinson's Appeal,* 92 Pa. St., 186.

There is no presumption that Albert S. and A. L. Deleplane, or that A. S. and A. L. Deleplane, are the same person.—*State v. Higgins,* 60 Minn., 1, 61 N. W., 316, 27 L. R. A., 74, 51 Am. St., 490; *Bowen v. Mulford, supra; Dutton v. Simmons, supra.*

It is realized and conceded that there is a long line of decisions, greatly preponderating in number over

those holding the contrary, that the law recognizes but one Christian name, and does not regard a middle name or initial as essential in designating a person; and, as an abstract proposition this is true, as indicated in the decisions from *Franklin v. Talmadge,* 5 Johnson, 83, to *Doane v. Glenn,* 1 Colo., 495, 502, and *Webster v. Heginbotham,* 23 Colo. App., 229, 238, 129 Pac., 569.

This is especially true where the identity is certain, or can be made certain by amendment and proof, and where the party is personally served or appears in the proceeding for any purpose. When this distinction is considered, together with the fact that in the present case service was made by publication, and the initials A. L. were used, and not the full Christian name, there is no conflict between these decisions and those relied upon for the conclusion reached herein.—*Patterson v. Walton,* 119 N. C., 500, 26 S. E., 43.

The further contention of appellant concerning the return of the summons has been disposed of against such contention in the case of *Gibson v. Foster,* No. 3673, recently decided by this court, *ante,* 252.

The judgment of the lower court is, therefore, affirmed, except as to Lots 1 and 2 and the east half of northwest quarter of Section 7, and the northwest quarter of Section 9, Township 18, Range 43. The judgment of the lower court is modified and affirmed, and the court is directed to enter judgment for the plaintiff as to these tracts, as prayed in his complaint. The former opinion is withdrawn, and the foregoing substituted. Costs of both courts to be equally divided.

Affirmed as modified.

Decided June 10, A. D. 1913. Judgment affirmed after rehearing September 15, A. D. 1913.

[No. 3687.]

THE CENTRAL SAVINGS BANK & TRUST CO. ET AL. V. THE AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS.

1. SOCIETY—*Rights of Seceding Members.* Members of an unincorporated society voluntarily retired from the organization. Held they had no right in funds deposited to the credit of the society.

2. EQUITY—*Remedy at Law.* It is important that the powers of the court of equity should be confined to cases where the law affords no speedy and adequate remedy. Equity will not entertain an action by a society against a bank to compel payment of the society's check and restrain it from recognizing certain seceding members. There being money in the bank to the credit of the society, an action at law for the dishonor of the check affords an ample remedy.

3. —— *Quieting Title—Personal Property.* Except under special circumstances, equity will not entertain a bill to quiet the title to personalty.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. HENRY J. HERSEY, Mr. S. E. MARSHALL, for appellants.

Messrs. VAN CISE, GRANT & VAN CISE, for appellees.

CUNNINGHAM, presiding judge.

The controversy which occasioned this lawsuit grew out of the withdrawal from the Amalgamated Society of Carpenters and Joiners (hereinafter referred to as the Amalgamated Society), or a branch of that organization that was operating in Denver, of a very large number of its members. Prior to this withdrawal, the branch or society had deposited a considerable sum of money with the appellant, The Central Savings Bank & Trust Company (hereinafter referred to as the bank), this deposit having been made for the purpose, on the part of the Amalgamated Society or branch, of establishing a checking account with the said bank. The officers who orig-

inally made the deposit, and who were made co-defendants of the bank, were among those members who withdrew, and thereupon a controversy arose as to who was entitled to the deposit, and who had authority to sign checks. The bank, under these circumstances, declined to honor any checks, or to pay over the money. Thereupon the Amalgamated Society and its officers brought a proceeding, which their counsel insist was an action to quiet title to the funds in the bank. Such preliminary proceedings were had as that an injunction was issued against the old officers of the society who had withdrawn from it, restraining the bank from recognizing its co-defendants, or either of them, as members of the Amalgamated Society, or paying out, removing or transferring the fund until the further order of the court. On the final hearing of the case the preliminary injunction was made perpetual, the bank was ordered and required by said decree to keep and perform its contract with the Amalgamated Society as a depositor according to its rules and the statutes of the state, and the Bank was enjoined from further refusing or declining to credit or pay interest on the fund deposited, which apparently under its rules and the original agreement made at the time of the deposit, it was legally required to do. The trial court found that the title to the fund was in the society, and that the withdrawing members, co-defendants with the bank, had no interest therein. With this finding of the court as to the title of the fund we are in entire accord, and while it may well be questioned whether the plaintiffs pursued the best course in bringing their action in the form in which it was brought, we are not disposed to disturb the judgment as to any of the appellants, save and except the savings bank. As to it, we think the preliminary injunction and final decree cannot be upheld. The deposit of the money by the society with the bank created the relationship of debtor and creditor as between

the society and the bank, and a court of equity ordinarily has no authority to require a debtor to keep and perform his contract with a creditor. The law affords the creditor a speedy and adequate remedy, and to it, rather than to a court of equity, the creditor must look for relief. If creditors are permitted to bring their actions in a court of equity and enforce the decree rendered in their favor by contempt proceedings, such courts would soon become the sole resort of creditors, and our prisons would need to be greatly enlarged.

Ordinarily an action to quiet title to personal property will not lie.

"The subject-matter of equitable jurisdiction to quiet title or remove a cloud is generally held to be confined to land, including the surface of the ground, and everything that is on it and under it, and not to extend to personal property."—32 Cyc., 1308; *Fudickar v. East River Co.*, 109 Calif., 29; 41 Pac., 1024; *Red Diamond Clothing Co. v. Steidemann*, 120 Mo. App., 525, 97 S. W., 220; *State ex rel. v. Wood*, 155 Mo., 425, 56 S. W., 474, 48 L. R. A., 596; 6 Am. & Eng. Enc. of Law (2nd Ed.), 150.

There are exceptions to this rule, and this court, in *Eagan v. Mahoney*, just handed down, (*ante*, 285) recognizes these exceptions. But the comparatively few cases wherein the right to maintain an action to quiet title to personal property has been upheld, such as *Magnusen v. Clithero*, 101 Wis., 501, 77 N. W., 882, and *N. Y. & N. W. R. R. Co. v. Schuyler*, 17 N. Y., 592, have every one presented some exceptional circumstance or condition which made it apparent that the plaintiff had no sufficient or adequate legal remedy at law. Such is not the case here, so far, at least, as the bank is concerned. There was nothing to prevent the plaintiffs from drawing a check on the bank and presenting it for payment. If the bank refused to pay, then it had a clear remedy at law in which all the difficulties, we believe, presented in this case could have

been promptly disposed of. It is important that the almost limitless power of a court of equity, when properly invoked, should be confined to those cases wherein the law affords no speedy or adequate relief.

If it be said that our conclusions already announced may oblige the appellees to bring another action against the bank, our answer is that this is a result for which alone the appellees are responsible. If they have improperly secured a decree from a court of equity against the bank, that decree must be reversed, even though it should lead to the misfortune of further litigation. But the trial court having found the title of the fund to be in the appellees, and that the bank's co-defendants are in no wise entitled to interfere with it in any manner, and we having upheld the findings and decree of the trial court to this extent, we are unwilling to believe that the bank, from mere caprice or a litigious spirit, will decline to recognize the rights of appellees to the fund. So long as there was a dispute as to the title to the fund, the bank was well within its right in declining to honor checks on the same until that dispute had been finally settled, especially as it does not appear that the appellees offered to indemnify the bank against any loss which might be occasioned to it by the honoring of their checks. In its answer the bank alleges that, "it simply wishes the court's decision as to who is entitled to check and draw upon the fund and money in this defendant's hands." This allegation, we are bound to believe, was made honestly, and now that the question as to the title to the fund has been finally determined, there ought, it seems, to be no room for further controversy. The amount of the money in the bank; the circumstances under which it was deposited; the interest which the appellees are entitled to receive upon it, and all such matters, are admitted by the bank, leaving for determination, so far as the bank is concerned, the sole questions of the title

to the fund, and the right of the appellees to a decree in equity against it.

The judgment of the trial court, in so far as it affects the bank, will be reversed, and in so far as it affects the bank's co-defendants, the judgment of the trial court will be affirmed. All the costs will be taxed to the bank's co-defendants. The judgment of the trial court is modified, and the case remanded for further proceedings in conformity with the views herein expressed.

Modified and Affirmed.

Decided July 14, A. D. 1913. Rehearing denied September 15, A. D. 1913.

[No. 3698.]

RIVERSIDE LAND & IRRIGATION CO. V. SAWYER ET AL.

1. SPECIFIC PERFORMANCE—*Certainty of Contract.* To specific performance it is required, not only that the contract should be certain and complete in all its terms, but each of its terms must be so clearly and exactly expressed that the court may proceed with reasonable certainty.
2. —— *Partial Enforcement*, is allowed only when justice and equity to all parties can be accomplished.

An agreement provided (1) that plaintiff should assign to defendant an option upon a certain ranch and the water rights thereto appurtenant, and provide an "adequate water supply" for the land, "using the water now going with the land, and such additions thereto as may be necessary to irrigate all of the land" which defendant might cultivate; (2) that defendant, upon consummation of the purchase of the land, pursuant to the option, should "transfer or enter into an agreement to transfer" to plaintiff all such water rights and "put the entire tillable portion of the tract into an irrigation district," afterwards to be organized; (3) that plaintiff would, upon the formation of the irrigation district, transfer to defendant bonds thereof, "representing the acreage placed in the district" by defendant, and "enter into an agreement to furnish" defendant "sufficient water to water all of the land that was or should be in cultivation at any time before water could be furnished therefor, under the irrigation district." Considering that the parties might never agree as to what would be "an adequate water supply," or as to what additions to the existing supply would be necessary, or as to what land defendant might be cultivating, that if the first part of the contract should be enforced and the irrigation district never or-

ganized, the defendant would own the land and the plaintiff the water rights, with no agreement between them as to how or upon what terms water should be furnished, that if disagreements as to these matters should arise the court would be powerless to compel them to enter into any contract, that these and many other obstacles, possible under the terms of the writing, presented an impossible barrier to specific performance of any feature of the agreement.

3. —— *Damages.* Held in the same case that plaintiff might proceed for damages.

Appeal from Mesa District Court. HON. SPRIGG SHACKELFORD, Judge.

Mr. W. L. BOATWRIGHT and Messrs. WHEELER & WEISER, for appellant.

Messrs. MCMULLIN & STERNBERG, for appellees.

MORGAN, J.

Appeal from a judgment sustaining a demurrer to the complaint, filed February 21, 1910, for a specific performance of an oral agreement, and damages for nonperformance, and on the plaintiff's election to stand on its complaint, dismissing the suit.

The contract was in substance:

"That the party of the first part, The Riverside Land & Irrigation Company, agrees to and with the party of the second part, R. H. Sawyer, that for and in consideration of the covenants and agreements hereinafter to be kept and performed, to transfer to the said party of the second part an option, then held by the said party of the first part from John Ternahan, on land, reservoir sites and water rights known as the John Ternahan ranch, together with the reservoir sites, ditch rights and water rights pertaining thereto, which said ranch is described as the John Ternahan ranch." [Here follows complete description of ranch] "together with all ditch and reservoir rights which have been used in connection with the aforesaid lands.

"The said party of the first part further agrees to

enter into an agreement to provide an adequate water supply for the land immediately, using the water now going with the land and such additions thereto as may be necessary to irrigate all of the land above described which the said party of the second part or his assigns may cultivate.

"The said party of the second part in consideration of the agreement above set out to be done and performed by the said party of the first part, agreed to and with the said party of the first part.

"1. To transfer or enter into an agreement to transfer to the said party of the first part, or to whomsoever it might direct, all the reservoir sites, water and ditch rights and stock pertaining thereto, immediately upon transfer of the same to him by John Ternahan.

"2. The said party of the second part further agrees to put the entire tillable portion of the said tract of land into an irrigation district hereafter to be organized, for the purpose of buying water from the system of the party of the first part as soon as such district is organized.

"3. The said party of the first part further agrees to and with the said party of the second part that upon the forming of the irrigation district that it would transfer to the said party of the second part bonds of such district representing the acreage placed in the irrigation district by the said party of the second part or his assigns; and that the said party of the first part further agreed to enter into an agreement to furnish to the said party of the second part sufficient water to water all of the above described land that was or should be in cultivation at any time prior to the time when the water could be furnished for the irrigation of said land under the irrigation district above referred to."

The complaint further states that plaintiff transferred the option to defendant Sawyer and he bought

the ranch, together with the ditch and reservoir rights; that Sawyer thereafter refused to convey the ditch and reservoir rights to plaintiff; that Sawyer, through a conspiracy with the other defendants to defraud plaintiff of the ditch and reservoir rights, sold and conveyed different undivided interests in the ranch and ditch and reservoir rights to the other defendants; that plaintiff performed all the conditions that it could perform, and was ready to perform all the other conditions of the contract, when the defendant Sawyer conveyed to it the ditch and reservoir rights, or entered into a contract to do so; that the plaintiff was damaged in the sum of $10,000 by reason of defendant Sawyer's non-compliance with the contract. The prayer is for a decree setting aside the deeds, and a specific performance of the contract as to the conveyance of the water and reservoir rights, or an agreement to do so, and for damages.

A careful examination of the record and the briefs of counsel leads to the conclusion that there are only two questions to be determined: *First,* Did the complaint state a cause of action for specific performance of that part of the contract upon which a performance is demanded? *Second,* If the complaint did not state such a cause of action, could it stand as a complaint for damages?

1. The contract upon which the suit is brought is an oral contract, and while there are many things in it that could be made certain which now seem to be too uncertain to admit of a specific performance, nevertheless, the contract is so indivisible and the material terms thereof are so interdependent that it would be beyond the power of a court to make or enforce a decree for a specific performance of that part of it upon which a specific performance is demanded by the plaintiff.

It seems to be a well settled rule with reference to suits for specific performance that the contract should

not only contain all the material terms necessary to make a complete and legal contract, but that each one of the terms should be expressed in a sufficiently exact and definite manner that a court may, with reasonable certainty, enforce the specific performance of it. Pomeroy, in his work on Specific Performance, sec. 159, says:

"An uncertain contract, therefore, may perhaps embrace, in a partial manner, all the material terms, but on account of the inexact, indefinite, or obscure language in which one or more of them is stated, it fails to express the intent of the parties with sufficient clearness to enable the court of equity to enforce its provisions. The specific performance of an agreement, thus uncertain, will not be decreed. No criterion can be formulated which shall be a test of certainty in every instance. As a general proposition, although it is perhaps too vague to be of much practical use, the terms of a contract must be expressed with a reasonable certainty, and what is reasonable in any case must depend upon the subject-matter of the agreement, the purpose for which is was entered into, the situation and relations of the parties, and the circumstances under which it was made. A greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced."

In 36 Cyc. the principle is announced on page 543, and on page 587 it is further stated that:

"The contract must be complete in all its parts; that is to say, it must contain all the material terms, and none of these terms must be left to be settled by future negotiations. It must also be certain; that is to say, each of the material terms must be expressed with sufficient clearness and definiteness to enable the court to ascertain the intent of the parties and to frame its decree in accordance with such intent. The court cannot make a contract for the parties *ex aequo et bono*. These two requirements of completeness and certainty, while logically distinct, may conveniently be treated together.

"An action at law for breach of contract can often be maintained, although some of the terms of the contract are not established with exactness. It is otherwise where specific performance is required. The court, in order that it may frame a decree in accordance with the intent of the parties, must be clearly apprised of that intent in all essential respects. A greater degree of certainty is required than in actions at law for damages. The terms must not be ambiguous, so that either party may reasonably misunderstand them, or so obscure or self-contradictory that the court cannot interpret them."

It naturally appears to the legal mind, also that specific performance of a contract should be enforced on the contract as an entirety, if possible, and if not possible, then, specific performance of a part thereof should not leave anything that depends upon that which is specifically enforced, or *vice versa*.

On page 572, 36 Cyc., it is said that "a contract to be specifically enforceable, must be such as can be enforced in its entirety; a partial enforcement by piecemeal not sufficing." This statement of the law, however, is general in its character, and is modified by the special exceptions thereto, that a contract may be enforced specifically as to a part of it where it can be done with equity and justice to all the parties thereto.

This contract sued upon is more in the nature of a preliminary statement of what the parties intended to do, rather than a specific contract to do any particular thing. The plaintiff contends that it may be specifically performed, to the extent that the court could enter a decree requiring the defendant to transfer to the plaintiff the water rights and reservoir sites, or enter into a contract so to do; and requiring the plaintiff to thereafter "enter into an agreement to provide an adequate water supply for the land, immediately, using the water now going with the land, and such additions thereto as may be necessary to irrigate all of the land above described which the said party of the second part (defendant) or his assigns may cultivate."

The court, in rendering a decree enforcing this part of the contract, would encounter obstacles wholly insurmountable, and such as the court would be powerless to enforce. The plaintiff and the defendant might never agree as to what an "adequate water supply" is; they might never agree as to what would be required as to "such additions thereto as may be necessary to irrigate all of the land." They might never agree upon the amount of the land which the defendant "or his assigns may cultivate." The defendant might demand that all the land be irrigated upon which the water had been applied, prior to that time, for a beneficial use, or he might demand that an adequate water supply be furnished for all land which he "may cultivate" thereafter, included, of course, in the description of his land described in the contract. If these disagreements arose in reference to this contract to furnish an adequate water supply, the court would be powerless to force the parties to enter into a contract upon the terms of which they could not agree. Furthermore, there is nothing in the contract, as set forth in the complaint, to show for what length of time this adequate water supply was to be

furnished, nor what was to be paid for it; the parties might disagree in regard to these matters, and never be able to enter into a contract of this character. It may be presumed that the plaintiff intended the contract to specify that it would furnish an adequate water supply until the irrigation district was organized, and it may be that the plaintiff intended to furnish this adequate water supply without charge up to that time; but neither of these presumptions is conclusive, as the contract is silent thereupon.

Now, as to the indivisibility of the contract; the enforcement of the part demanded necessarily depends upon the organization of the irrigation district, and the amount of bonds to be issued to the defendant after such organization. If the irrigation district were never thereafter organized, the parties would be left, under an enforcement of the first part of the contract, wholly without any contract for the future as to the furnishing of water; the defendant would own the land; the plaintiff would own the water rights and reservoir sites, with no contract between them as to how and upon what terms the water would be furnished. The land would be worthless without the water, possibly, to the defenant, but the water rights and reservoir sites might be very valuable to the plaintiff. Furthermore, the defendant might demand a greater number of bonds if the irrigation district were organized thereafter than the plaintiff would be willing to issue to him, and if a disagreement arose on that account and no contract was entered into in reference to it, the parties would again be left with one of them owning the water rights and the other owning the land. Other lawsuits would necessarily follow, and no court would be expected to constantly supervise future contracts between the parties and require them to make such contracts as would satisfy the conditions, because this would be beyond the functions of any court. A careful

reading of the contract, with the purposes of the parties in view, will disclose many other obstacles in the way of a specific performance of any part thereof, as well as impassable barriers to a specific performance of the contract as an entirety.

The authorities all are to the effect that the courts are slow to enforce the specific performance of contracts where an action at law may be maintained for damages thereupon. Although this contract comes within the scope of that class of contracts that permits a specific performance to be decreed thereupon, nevertheless, on account of the great uncertainty thereof, specific performance ought not to be decreed in this instance.

2. An examination of the authorities, and especially the discussion by Mr. Pomeroy in his work on Specific Performance, justifies the conclusion that a court of equity may proceed with the case, as an action for damages, although it may conclude that the complaint does not state facts permitting specific performance. He specifically distinguishes between compensation and damages, and although he says, this relief of damages, under the ancient system, is only given in exceptional cases, and purely as ancillary to the equitable remedy when the court has already obtained jurisdiction of the case by virtue of its equitable powers and determines to do full justice to the party in one cause, instead of compelling him to commence a separate litigation in a court of law; he thereafter concludes that, by the reformed procedure, all old grounds and reasons, upon which under the ancient system the rule was based which forbids the award of damages in equity suits, have been expressly and intentionally removed.—Pomeroy on Specific Performance, sec. 480.

Mr. Waterman, in his work on Specific Performance of Contracts, says, sec. 516:

"In New York, under the existing practice by which

the former distinction between legal and equitable actions has been abolished, and legal and equitable causes of action and remedies made capable of being united and administered in one action, the old rule as to knowledge of the plaintiff affecting his right to damages in equity is no longer regarded. When the complainant states facts giving an equitable cause of action, and also a legal cause of action, arising out of the same transaction, the party is entitled to have the latter tried, if necessary to obtain his rights, although he fails to show a right to equitable relief. The claim of damages for breach of contract 'must be tried by the court or a referee, unless some questions of fact involved are ordered by the court to be tried by a jury. Either party has a right to a jury, if the ends of justice require the trial of both; or both may be tried by the court or a referee, if the parties so desire.' "

Sternberger v. McGovern, 56 N. Y., 12, 20, 21.

In Fry on Specific Performance, after stating the purpose of Lord Cairns' Act, and the Judicature Acts, this English author says:

"The plaintiff may now therefore come to the court and say, give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at common law by reason of the breach of the agreement."

Our Code of Civil Procedure is more comprehensive and of broader scope than either of these English acts, and, under its provisions, although specific performance may be denied because the plaintiff has failed to state or prove facts entitling him to such relief, he may in the same suit, in addition to, or in substitution for, relief in equity, recover damages for a breach of the contract. It is contended that the complaint does not state a cause of action for damages under the decision in the case of

Winter v. Goebner, 2 Colo. App., 262, 30 Pac., 51, affirmed in 21 Colo., 279, 40 Pac., 570, and that the judgment should, therefore, be affirmed *in toto;* and that an action in equity should not be changed, by amendment, into an action at law.

The complaint in this case is sufficient as it stands for the court to proceed to try the issues as to the damages; there is a consideration here, while the court stated in the *Winter v. Goebner* case that the contract was without consideration, and it could not be so easily determined what the damages consisted of in that case as in this. The plaintiff may desire, however, to amend the complaint so as to more specifically state its claim for damages, or the defendant may require the same as provided in sec. 66, Rev. Code, 1908; Mills' Ann. Code, sec. 60. Such amendment need not change the suit into an action at law. The present tendency of the bench and bar and of legislative authority is toward further simplicity and liberality in procedure, with the purpose to enforce a full, complete and speedy determination of all the issues between litigants in one action, suit or proceeding.

For these reasons, the judgment is reversed and the cause remanded for further proceedings in accordance with this opinion, with permission to amend the complaint as to damages.

Reversed and Remanded.

Decided July 14, A. D. 1913. Rehearing denied September 15, A. D. 1913.

[No. 3632.]

SCOTT v. CONRAD.

1. TAX TITLES—*Tax Deed Not Recorded,* conveys no title. An admission of its execution, with a denial that it was recorded, does not admit its *prima facie* validity.

2. LIMITATIONS—*Five Years' Statute.* A bill to quiet title is not an action "for the recovery of land" within the meaning of Rev. Stat., sec. 5733.

3. —— *Tax Deed Not Recorded*, does not set in course the statute limiting actions for the recovery of land sold for taxes (Rev. Stat., sec. 5733).

4. APPEALS—*Judgment.* Where the record fails to disclose any satisfactory evidence as to the real merits of the controversy the judgment will be reversed and the cause remanded for a new trial.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

KING, J., delivered the opinion of the court.

Lincoln R. Scott, appellant here, brought this action to quiet title to the northeast quarter of section 34, township 3 south, range 43 west, the complaint being in the usual form under section 255 of the civil code. The pleadings are voluminous; the evidence offered at the trial, brief and undisputed.

Plaintiff, at and for a few days prior to the beginning of the suit, was the ostensible owner of the fee simple title to said lands, unless said title had been extinguished by the treasurer's tax deed hereinafter mentioned. Plaintiff took his title by quitclaim deed dated on or about April 6th, 1906, and immediately after receipt of said deed, took actual possession of the land, and was so in possession at the beginning of the suit, April 23rd, 1906. Defendant claims title by virtue of a treasurer's tax deed dated March 7th, 1899, and alleged to have been recorded March 14th of the same year, by which said lands were conveyed to W. T. Lambert, who, on the 14th of November, 1905, by his quitclaim deed, conveyed the same to the defendant. This quitclaim deed was alleged to have been recorded March 7th, 1906. Defendant claims the benefit of the five-year statute of limitations upon the ground that said tax deed "is regular

and valid in all respects, and was issued and recorded more than five years prior to the beginning of the action." Plaintiff admits the execution of said tax deed, does not challenge the *prima facie* regularity and validity thereof, upon its face; alleges that the said deed is void for want of publication of notice of sale, and list containing a description of the land, and because no affidavit of publication of such notice or list, if made, was transmitted to the treasurer, as required by law; alleges that although the deed was issued in the name of said Lambert, one-half of the money paid as a consideration therefor was furnished by plaintiff, and that the title so taken in Lambert's name was taken in trust, and for that reason plaintiff was and is the equitable owner of an undivided one-half interest in said premises; admits the quitclaim deed from Lambert to Conrad, but alleges that the same conveyed nothing more than said Lambert in fact owned, to wit, an undivided one-half interest, provided anything passed to Lambert by said tax deed. That either the alleged tax deed or the quitclaim deed, relied on by defendant, was recorded, is not admitted nor proven. The evidence shows that by an agreement between Lambert and plaintiff the land was purchased at tax sale with money furnished in equal proportions by Lambert and plaintiff, and for their mutual benefit.

As has been said, plaintiff was the apparent owner of the title deraigned from the government, which we will designate as the fee title to distinguish it from the alleged tax title, and was in actual possession of the land at the time of the commencement of the suit. By virtue of the fee his grantors had constructive possession at and prior to the time of the execution of the treasurer's tax deed. Neither defendant nor his grantor having been in actual possession, this constructive possession was not terminated until actual possession was taken by plaintiff, and thereby both the fee and the possession united in

plaintiff at the commencement of this suit, unless his title was extinguished by defendant's tax deed. That deed was not offered in evidence. Appellee contends that the execution and record of said tax deed was admitted, and, not being offered in evidence by plaintiff to show its invalidity, it will be presumed that the deed is fair on its face, and, having been recorded more than five years, evidence *aliunde* to defeat it was not admissible. Under the state of the record the presumption claimed cannot be indulged. There is no admission that the tax deed was recorded. Such allegation was put in issue. A tax deed without record conveys no title.—*Morris & Thombs v. Bank,* 17 Colo., 231, 29 Pac., 802; *Empire Co. v. Webster,* 52 Colo., 207, 121 Pac., 171.

The five-year statute of limitations cannot be invoked for the reason that the action is not for possession, and for the further reason already given, that there is neither evidence nor admission of title, or color of title, which would set said statute in operation.

The judgment should have been for plaintiff quieting his title to the entire premises, except for the fact that it appears to be admitted by him that, notwithstanding the evidence of his title in fee to the entire premises in litigation, the said Lambert, by virtue of some agreement between them, was the equitable owner of an undivided one-half interest therein; that the fee title taken and held by plaintiff was as much in the interest of said Lambert as of plaintiff, and that whatever interest Lambert had was sold and conveyed to defendant.

From what has been said, it is evident that upon the present showing any title defendant has must be derived through Lambert's interest in the fee acquired and held by plaintiff, and not through the tax deed; and, therefore, the quitclaim deed to defendant conveyed only Lambert's interest therein so derived. There is nothing in the record upon which the judgment of the trial court for the

defendant, as to the entire tract, can be affirmed, and no satisfactory evidence upon which this court feels justified in directing judgment. Both parties seem to have skilfully and effectively avoided a trial of the cause on its merits. The judgment will be reversed and the cause remanded for a new trial.

Reversed and Remanded.

[No. 3657.]

THE LARIMER COUNTY CANAL NO. 2 IRRIGATING COMPANY V. HERRING.

IRRIGATION—*Seepage—Liability of Owner of Ditch.* One operating an irrigating ditch is liable to the owner of neighboring lands injured by seepage from the ditch attributable to negligence in the management thereof.

And, where the one operating the ditch is entitled to convey the water therein only by a conveyance from the injured party which reserves to the grantor all rights of action for "damages occasioned by seepage," negligence need not be shown.

Appeal from Larimer District Court. HON. H. P. GAMBLE, Judge.

MESSRS. RHODES & TEMPLE, for appellant.

MR. FANCHER SARCHET, for appellee.

CUNNINGHAM, Presiding Judge.

At a time not disclosed by appellant's abstract, appellee, Herring, filed suit in the Larimer district court to recover damages from the appellant, the irrigating company, alleged to have been occasioned to his growing crops and land by reason of the seepage water from the irrigation canal owned and used by appellant. Plaintiff alleged that he had suffered damages in the sum of $1,900 on account of a decrease in his crops incident to the seep-

age, and that his land had been damaged in the sum of $600. The jury fixed his damages at $733, upon which judgment was entered, and from this judgment the case is brought here on appeal by the irrigating company. There was ample evidence to support the verdict. Indeed, the evidence would, in our judgment, have supported a very much larger verdict.

But even if the evidence had failed to disclose negligence on the part of the defendant company, still, under plaintiff's second cause of action we think the evidence and the law would have supported the verdict rendered. The ditch through which the irrigating company was running water had been for some twenty-five years used by the city of Fort Collins for the purpose of carrying about thirty feet of water. In 1906 or 1907 the irrigating company acquired this canal from the city, and proceeded to run one hundred and sixty or one hundred and seventy-five feet of water through it. Its right to run this additional volume of water was not acquired by condemnation, but by a deed from the appellee, and another, in which deed there was a condition excepting from the conveyance, "damages occasioned by seepage, breaking of said ditch, or overflowing thereof to the damage of the land, crops or trees of the first party," on the land involved in this action. The evidence is overwhelming, indeed uncontradicted, that the plaintiff had cropped the land in question for some twenty-three years, while the city was running the thirty feet of water through the ditch, and that no damage had resulted from the operation of the ditch by the city in this manner. The evidence is also clear that in the year 1907, when the damages in question occurred, and which appears to have been the first year that the one hundred sixty or one hundred seventy-five feet of water was run through the ditch by the defendant, the water seeped from the ditch upon and over plaintiff's land as a result, not alone of the negli-

gent manner in which the ditch was operated, but by reason of the vastly increased burden put upon it.

Appellant's complaint of the trial court's instructions, we think, is without merit.

Judgment Affirmed.

[No. 3671.]

EMERSON v. VALDEZ.

1. TAX TITLE—*Void Deed.* A treasurer's deed which shows upon its face that the lands were struck off to the county on the same day on which they were first offered; or which, being based upon a sale to the county and an assignment of the certificate, fails to show by what officer the assignment was made; or which fails to show the date of the sale, is void.

2. —— *Sale to a County—Assignment of the Certificate.* A tax deed which, showing a sale of the land to the county, recites an assignment of the certificate of purchase by the county "by its proper officers" is not a compliance with the statute (Rev. Stat., sec. 5729).

3. —— *Second Sale After Sale to County Not Redeemed.* Under Rev. Stat., sec. 5713, a sale for taxes, though upon due advertisement, after a sale of the same lands to the county which is still unredeemed and the lands unsold, is void.

4. —— *Evidence Aliunde to Show Compliance With the Statute, the Deed Being Void Upon Its Face,* is not admissible upon the hearing of a bill to quiet the title asserted under such deed. In an action to reform the deed, it may be otherwise.

Appeal from Rio Grande District Court. HON. CHARLES C. HOLBROOK, Judge.

Mr. JOHN F. MAIL, for appellant.

Mr. IRA J. BLOOMFIELD and Mr. JESSE STEPHENSON, for appellee.

HURLBUT, J., delivered the opinion of the court.

March 23, 1908, appellee, as plaintiff, brought an action against defendant (appellant) to quiet title to the northeast quarter of section 6, township 39 north, range

7, east of the New Mexico meridian, Rio Grande county, claiming title under certain tax deeds. Defendant answered, denying plaintiff's ownership and alleging that each of said tax deeds under which plaintiff claimed was void on its face, and also for reasons not apparent on the face thereof; and, by way of cross-complaint, alleged that said tax deeds constituted a cloud upon defendant's title, vested in him by sundry *mesne* conveyances from the government; and prayed that his title be quieted, and that he recover possession of the premises which plaintiff wrongfully withheld from him. Plaintiff filed his replication, in which he denied defendant's title, and, answering defendant's cross-complaint, pleaded the short statute of limitations as a bar thereto. The applicability of the statute was denied by further plea of the defendant. The pleadings are voluminous, and much of the matter therein contained redundant, and of no assistance in presenting the issues tried by the court. The above is probably a sufficient statement of the pleadings in order to properly understand the issues.

Although from appellee's brief it appears that four or five tax deeds were relied on by plaintiff to prove his title to the land, it will be unnecessary to consider but two thereof, to wit: Exhibit No. 1, a tax deed executed and delivered December 18, 1901, and recorded the following day, based on a sale of the land December 15, 1898, for the taxes of 1897; and Exhibit No. 12, a tax deed dated October 26, 1908, based upon the same sale and the same certificates of purchase, which is alleged to have been executed to correct the defects appearing on the face of Exhibit No. 1. These instruments are the only ones which plaintiff relies upon to confirm his right and title to the disputed premises. With the exception of a certain special warranty deed, he has expressly excluded all others by statements in his brief to the effect that he claims nothing by reason of any other deeds. Plaintiff

admits that defendant holds title by sundry *mesne* conveyances from the government. Judgment was rendered for plaintiff, adjudging him to be the owner in fee simple of the premises, and quieting title in him as against defendant. The special warranty deed above mentioned is dated April 21, 1900, and was executed by Thomas A. Good to Francisco Valdez for the controverted ground, and nearly eighteen months before the deed of December 18, 1901. The record so clearly shows that at the time Good gave this special warranty deed he had no title to the premises that we will not further notice it.

It is earnestly insisted by appellant that the tax deeds in question, exhibits 1 and 12, are void. Under the decisions of the supreme court, as well as this court, there can be no question but that each of said deeds is void on its face. Exhibit No. 1 is void on its face for the following reasons:

(1) The property was offered for the first time on December 15, 1908, and sold on that day to the county at a public sale begun on December 12th of the same month. —*Vandermeulen v. Burwell,* 22 Colo. App., 486, 125 Pac., 131; *Lambert v. Murray,* 52 Colo., 156, 120 Pac., 415; *Vanderpan v. Pelton,* 22 Colo. App., 357, 123 Pac., 960; *Bryant v. Miller,* 48 Colo., 192, 109 Pac., 959; *Newcomb v. Henderson,* 22 Colo. App., 167, 122 Pac., 1125; *Empire Co. v. Howell,* 22 Colo. App., 389, 122 Pac., 592; *Empire Co. v. Gibson,* 23 Colo. App., 344, 129 Pac., 520; *Empire Co. v. Howell,* 23 Colo. App., 348, 129 Pac., 521; *Empire Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522; *Charlton v. Toomey,* 7 Colo. App., 304, 43 Pac., 454.

(2) It is also void on its face for failure to state what officer made the assignment of the certificate.—*Foster v. Clark,* 21 Colo. App., 192, 121 Pac., 130; *Empire Co. v. Smith,* 23 Colo. App., 53, 127 Pac., 449.

The tax deed, Exhibit No. 12, alleged to have been issued to correct irregularities and ambiguities in Ex-

hibit No. 1, heretofore discussed, is void on its face for the following reasons:

(a) Because it does not recite the date of the sale.—*Foster v. Clark, supra; Vanderpan v. Pelton, supra.*

(b) It fails to show what officer made the assignment.—*Foster v. Clark, supra; Empire Co. v. Smith, supra.* The recital in this respect is as follows:

"And whereas the said county of Rio Grande, by its proper officers, did on the 26th day of October, A. D. 1908, duly assign the certificate of the sale of the property as aforesaid," etc.

The statute specifically defines the official who has authority to make the assignment of the certificate of sale, and it must affirmatively appear from the deed that such officer acted. The recital that "the said county of Rio Grande, by its proper officers, did * * * duly assign the certificate," fails to comply with this requirement, but is a palpable evasion of it.

May evidence *aliunde* be accepted when offered to cure the defects of a tax deed void on its face, offered as proof of title? In *Page v. Gillett,* 47 Colo., 289, 107 Pac., 290, it is held that outside testimony is not competent to bolster up a deed void on its face; that such proof might tend to show a valid sale, but would not mend a void deed; that the suit was not one to reform a conveyance, but, on the contrary, the conveyance was affirmatively relied on as passing good title. The case of *Newsom v. Jacobs,* 51 Colo., 571, 119 Pac., 623, rigidly follows the rulings laid down in the Gillett case, and reaffirms all therein decided. *Bryant v. Miller,* 48 Colo., 192, 109 Pac., 959, is another case which seems to sustain the view that proof *aliunde* cannot be accepted in support of a tax deed void on its face. The defendant, Bryant, in an action brought against him to quiet title, pleaded a certain tax deed which appeared to be void on its face. On demurrer the supreme court held the plea bad and ordered the title

quieted in plaintiff. In *Page v. Gillett* and *Newsom v. Jacobs, supra,* it was held that the suit under consideration was not one to "reform a conveyance," intimating in a measure that had the suit been one to reform the tax deed the evidence might have been admissible. It is apparent that in the instant case the pleadings in no way indicate or suggest an action to reform a conveyance. From our interpretation of the letter and spirit of the three cases last cited we think the evidence *aliunde* offered and received at the trial in the instant case, for the purpose of showing that all preliminary steps up to the time of the tax sale were valid in all respects, was not admissible to contradict and vary the positive recitals of the tax deeds, exhibits 1 and 12, which make them void on their face, although in a suit to reform such tax deeds so as to speak the truth it might have been admitted and become sufficient with other evidence to authorize a court of equity to decree the reformation. The case of *Knowles v. Martin,* 20 Colo., 393, 38 Pac., 467, cited by appellee, may not appear to be in harmony with the three cases last cited. However that may be, those cases are the latest expression of that tribunal upon the question.

Even though evidence *aliunde* were held to be admissible to show compliance with the law as to the notice of sale, actual sale in 1898, and assignment of the certificate, nevertheless the plaintiff's pleadings show that the sale itself was void, because there were no delinquent taxes at the time the land was advertised for sale. The pleadings show that at the time of the sale in 1898 a tax sale certificate to the county was outstanding, unsold, unassigned, and unredeemed, and therefore, under the statute, the taxes could not be due and payable at the time of that tax sale. Section 3888, 3 Mills, last paragraph, viz.:

"No taxes assessed against any lands purchased by the county under the provisions of this section shall be payable until the same shall have been derived by the county from the sale or redemption of such lands."

For the reasons given the tax deeds, exhibits 1 and 12, conveyed no title in the disputed premises to plaintiff, and the court erred in admitting them in advance.

Other assignments of error discussed by counsel need not be noticed, as those already disposed of compel a reversal of the judgment.

Judgment Reversed.

[No. 3682.]

GIBSON v. BRAGG.

TAX TITLES—*Tax Sale—Effect.* A tax sale regular in all things, and the deed of the treasurer executed pursuant thereto, extinguishes existing titles and vests paramount title in the grantee.

Appeal from Montrose District Court. HON. SPRIGG SHACKLEFORD, Judge.

Mr. P. B. GODSMAN, Mr. JOHN F. MAIL, for appellant.

Mr. MILLARD FAIRLAMB, for appellee.

Per Curiam.

Appellee, as plaintiff below, brought his action under the code to quiet title to certain lands, and had judgment. Plaintiff deraigned his title from a tax deed issued to a remote grantee. So far as the abstract of record disclosed, the tax deed was fair on its face. Indeed, it is not assailed by appellant in his brief for any reason. The proof showed plaintiff in possession of the land. Defendant's title was predicated solely upon instruments of conveyance antedating the tax deed and sale. The tax deed appearing in all respects regular, in so far as we can determine from the abstract of record prepared by appellant, and our attention being called to no defects therein, either on its face, or in the proceedings leading up to it, extinguished defendant's prior title, and vested para-

mount title in the grantee named in the tax deed, from whom plaintiff deraigns his title, hence the trial court properly excluded the government patent and other muniments of title offered by defendant.

Judgment Affirmed.

[No. 3690.]

EMPIRE RANCH & CATTLE CO. v. MILLET.

1. PLEADING—*Supplemental Answer—Discretion—Ejectment.* Defendant served a copy of his answer, but neglected to file it. The cause was set for trial on various occasions, but continued from time to time for more than three years. Then, coming on for trial, it appearing that the answer had never been filed, the court permitted it to be filed as of the day upon which the copy was served, and refused to receive it as of any later date. Defendant then applied for leave to file a supplemental answer setting up an amended tax deed, executed on the day next previous to the trial, supporting the application by an affidavit of his attorney that after the cause was set for trial he discovered that a tax deed upon which he relied was void; that he had made application for an amended deed, but did not know until the day of the trial that it had been executed. Objection being made, the long pendency of the cause, the frequent postponements, that plaintiff and his attorney had come to the trial from a great distance and were not prepared to try the issues presented by the proposed supplemental answer, being suggested as grounds of the objection, the court declined to receive the supplemental answer. *Held* that in view of the evident laches of the defendant, that the amended deed was nowhere in the record shown or even alleged to be a valid deed, that this was not matter of presumption, and that, if void, the deed would have been unavailing, it was not to be said that the court below had, in either ruling, abused its discretion, or that the defendant had been prejudiced thereby.

2. EJECTMENT—*Defendant's Possession.* Under sec. 295 of the code, where the defendant asserts title the plaintiff is not required to prove the defendant's possession.

3. COUNTY COURT—*Jurisdiction.* Where, in an action in the county court, the allegations of the complaint as to the value in controversy conform to the statute (Rev. Stat., sec. 1527), the jurisdiction of that court is not open to question upon appeal, unless something affirma-

tively appears in the record to divest the jurisdiction rightfully acquired.

4. JUDGMENT—*Jurisdiction of the Court*, may be questioned at any time for want of necessary averment, or evident lack of jurisdiction *ab initio*.

5. APPEAL—*Jurisdiction of the Court a quo*, is not to be brought in question for the first time upon appeal, unless the absence of jurisdiction appears affirmatively from the record.

6. JURISDICTION—*Plea to*. The general denial does not put in issue the jurisdiction of the court. A special plea is required.

7. —— *Burden of Proof*. The defendant assailing the jurisdiction of the court has the burden of proof.

Appeal from Washington County Court. HON. IRA M. BARNHOUSE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

KING, J., delivered the opinion of the court.

This action for recovery of the possession of real property was brought by Addison E. Millett, appellee here, as plaintiff, alleging that he was the owner in fee simple and entitled to the immediate possession of said property, and that the defendant wrongfully withheld possession of and exercised acts of ownership over the same. Thereafter, one Roy C. Stout, a minor, by his next friend, intervened, alleged that he was the owner of an undivided one-third interest in said property by inheritance from his father; adopted all allegations of the complaint as true, with the exception that he alleged that plaintiff was the owner of only an undivided two-thirds interest in the land; asked to be made a party plaintiff, and that the defendant be ruled to answer as to both plaintiffs. Thereafter defendant filed its answer consisting of a general denial, with a prayer that it be adjudged the owner and entitled to possession of the premises mentioned in the complaint. At the trial plaintiff

deraigned title from the government by *mesne* conveyances, and the intervenor through *mesne* conveyances and by inheritance from his father,—plaintiff to an undivided two-thirds interest and the intervenor to an undivided one-third interest. Defendant offered no evidence, and its appeal is predicated upon alleged errors of the trial court as to amendments of pleadings and admission of evidence, and insufficiency of the evidence to sustain the judgment, which will be considered so far as deemed necessary.

1. In May, 1907, defendant served a copy of its answer on plaintiff's attorney. The cause was tentatively set for trial a number of times, and finally, by written stipulation, came on for trial July 7th, 1910, at which time it was discovered that no answer had been filed. Application to file the same at that time was objected to by plaintiff unless it be filed as of May 8th, 1907, about the time of the service of a copy thereof on plaintiff's attorney. This objection was sustained and the answer filed July 7th, 1910, as of May 8th, 1907. This ruling and action of the court defendant contends was prejudicial error, for reasons hereinafter stated. Defendant then made application to file its supplemental answer in words and figures as follows:

"Comes now the defendant by R. H. Gilmore, its attorney, and files this its supplemental answer herein, and states that on the 6th day of July, A. D. 1910, the county treasurer of said county issued to the defendant a correction tax deed conveying the lands described in the complaint. And on the same day the same was filed for record in the recorder's office of said county, and duly recorded in book 83 on page 386 of the said records. That the defendant incorporates herein the denials contained in the original answer to which this is supplemental, and prays for same relief as in the original answer."

This application was supported by affidavit of the

attorney to the effect that some time after the first of July, and after the cause had been set for trial, he discovered that the tax deed upon which he was relying was void, and that he had made application to the county treasurer for a correction deed, which was executed July 6th, and on that date filed for record, and that he did not know until the day of the trial, to wit, July 7th, that the same had been obtained. Upon objection of the attorney for plaintiff the court declined to permit said supplemental answer to be filed, for reasons which do not appear except as they may be indicated by the affidavit of plaintiff's attorney showing that the cause had been pending for more than three years, set for trial a number of times, and both plaintiff and his attorney had come a long distance and at great expense, to try the cause, and were not prepared to go to trial upon the issues raised by the supplemental answer. Defendant insists that this ruling of the court, as well as that of filing its answer as of May 8th, 1907, was prejudicial error, for the reason that defendant was thereby debarred from proving its alleged title, acquired after the suit was begun, under its alleged correction tax deed. While we think the court might well have exercised its discretion by allowing the supplemental answer to be filed, nevertheless, it was discretionary with the court, and, in view of the evident laches of the defendant, as shown by the delay of three years after the cause was begun, without any satisfactory explanation for such delay, we cannot say that the court abused its discretion. And it is evident that the defendant was not debarred by any ruling of the court from offering its alleged correction tax deed in evidence. The court had no opportunity to rule upon the question of its admissibility. Upon inspection it might have been ascertained, as asserted by plaintiff, that it also, as well as the deed of which it was an amendment, was void on its face. There is nothing in the supplemental answer, or elsewhere in

the record, which alleges, or attempts to show, that the correction tax deed was in fact valid. The word "correction" ought to mean "amendment to speak the truth." No presumption can be indulged that speaking the truth as to the sale would validate the deed. If such deed was void, its admission would have been unavailing; and, in its absence from the record, this court is unable to say that the ruling of the trial court, by reason of which appellant contends it was prejudiced, was in fact prejudicial, under the facts here presented.

2. Section 295 of the civil code (Rev. Stats., '08) provides that in an action of this kind "if the defendant files or makes any other answer or defense than a disclaimer of title or right of possession, it shall not be necessary for plaintiff to prove him (defendant) in possession of the premises at any time." For its answer, defendant filed a general denial and asked affirmative relief. By reason of such answer and the code provision mentioned, plaintiff was not required to offer proof, either of the possession of the defendant or acts of ownership by it.

3. Plaintiff alleged that the value of the matter in controversy did not exceed the sum of two thousand dollars, but offered no proof thereof, nor does anything appear in the record as to the value of the land. Appellant earnestly contends that in the absence of such proof the court had not jurisdiction to enter the decree. We do not so understand the rule. We are not aware of any case in the supreme or appellate courts of this state, or elsewhere, in which the precise question here involved has been decided or presented. But we think that inasmuch as the allegations of the complaint, in conformity with the statute, gave the court jurisdiction of the subject-matter, its jurisdiction to pronounce the judgment cannot be questioned upon appeal, unless something affirmatively appears which would operate to divest the

jurisdiction rightfully acquired in the beginning.—*Denver W. & P. Ry. Co. v. Church,* 7 Colo., 143, 2 Pac., 218. Moreover, this question was not raised in, nor in any manner called to the attention of, the trial court, nor directly by the assignments of error, or otherwise, in this court, until the filing of the brief and argument of appellant. And, although for want of proper averment, or for evident lack of jurisdiction *ab initio,* the question of the jurisdiction of the court may be raised at any time or place, we do not understand that as a matter of proof it can be successfully raised for the first time upon appeal, unless, as has been said, the want of jurisdiction appears affirmatively from the record. Furthermore, we think the allegation of jurisdiction is not properly put in issue by a general denial, but that it should be specially controverted or put in issue; and, that if so controverted, the burden of ousting the court of jurisdiction by proof is upon the party seeking its divestiture. It is so held in the federal courts as to the allegation of diverse citizenship necessary to give such courts jurisdiction, and as to the burden of proof if controverted. These cases are sufficiently analogous in principle to furnish authority for our conclusion.—*Foster v. Cleveland, etc., Ry. Co.,* 56 Fed., 434, and cases cited; *Fremont v. Merced Min. Co.,* 1 McAll., 267, Fed. Cas. No. 5095. The allegation under consideration is not of a matter which goes to the merits of the case, and therefore not strictly governed by the rule that necessity for proof follows that of allegation.

Other questions are raised which have received consideration, but which we think do not require especial mention in this opinion. Finding no substantial error in the record, the judgment is affirmed.

[No. 3720.]

SORENSON v. NORELL.

1. TRIAL—*Upon Issues Variant From the Pleading.* Where, by consent of the parties, the sole question tried in the court below is one not presented by the pleadings, the defeated party will not be heard to complain, upon appeal, that the judgment is without the issues.

2. WATER RIGHTS—*Natural Stream Used as a Conduit—Right of Appropriator.* An appropriator who uses the channel of a natural stream to convey the water of his appropriation is entitled to take from the stream only such volume as he may measure, recapture from the stream, and actually apply to beneficial uses, due allowance being made for loss in transit from the point of measurement to the point of recaption. What he fails to so apply may be distributed to other appropriators, according to their priorities.

3. INJUNCTION—*When Allowed.* Equity will not award an injunction to enforce a right, or prevent a wrong, in the abstract, without proof of a well-grounded apprehension of immediate or future injury.

Appeal from Larimer District Court. HON. HARRY P. GAMBLE, Judge.

Messrs. LEE & AYLESWORTH, for appellant.

Messrs. FLEMING & BAILEY, for appellee.

MORGAN, J.

The appellee, Norell, brought this suit in the Larimer district court, March 29, 1909, alleging that he was the owner of certain duly adjudicated water rights, and sought by this suit to enjoin the taking of part of the water so appropriated that he turned and permitted to flow from his lands and ditches into the channel of a certain creek, alleged to be used as a ditch by him, to convey all such water to a point further down the creek, where he recaptured it and was applying it upon other lands belonging to him, and, incidentally, to have his right to so use such water determined as to the defendant, Sorenson, charging him with taking, and that he would con-

tinue to take, these waters from the channel aforesaid for use on his own lands. Plaintiff asked damages also to his crops caused by such taking. The defendant admits the decreed appropriations of plaintiff, but denies his ownership of the waters that were permitted to flow as alleged into said creek; and claims the right to take said water out of the creek by reason of an appropriation duly adjudicated to a certain ditch that he has taken out, the headgate of which is above the point of diversion where the plaintiff takes out of said channel the water alleged to be recaptured by him. Defendant filed a cross-complaint, also, asking that his title to said waters be quieted. Plaintiff in reply denies, generally, but admits the decree for defendant's ditch.

At the close of the trial the defendant withdrew his cross-complaint and the court gave judgment against the plaintiff on his claim for damages and assessed the costs of the suit against him, but gave him judgment for all of the water which he intended to retake for a beneficial use, so turned from his lands and ditches into said channel; and incorporated in the judgment an order perpetually enjoining the defendant from taking any of the said water out of the creek after the plaintiff had, as directed in the judgment, or by some other practical device, measured the water that belonged to him which he turned into said creek.

It appears from the evidence that the principal contention in the case, raised by the pleadings and disclosed by the testimony, arises over the ownership of, and the right to use, the water so alleged to run into said channel from plaintiff's lands and ditches; the plaintiff contending that he is entitled to all of it when recaptured further down the creek, the defendant contending that but a small portion thereof had ever been recaptured, and that the remainder is waste water, abandoned by the plaintiff, and which he, the defendant, is entitled to take out of

said creek into his own ditch, according to its decreed appropriation. This was the issue that was tried, and the withdrawal of the cross-complaint at the close of the testimony did not change said issue, but only resulted in withdrawing defendant's prayer to have his title quieted. This issue as to the ownership and right to use this water might have been joined by more complete and appropriate pleadings; yet, the case was tried as though the pleadings were so drawn, and the court and the parties tried this and no other issue. Therefore, appellant's contention that the judgment is wholly outside of the issues joined by the pleadings is without merit. That part of the decree, however, giving to plaintiff all of said water after measurement, and enjoining defendant from taking any of it, is not the law applicable to the issues, as the plaintiff is only entitled to such amount thereof as he may measure, recapture and actually apply to a beneficial use, after he causes it to flow into said channel, due allowance being made for loss in transit from the point of measurement to the point of recapture; and that which is not so applied, so long as the plaintiff continues to turn such water into the channel, may be distributed among the other appropriators on said creek, according to their priorities.—*La Jara, etc., Assn. v. Hansen,* 35 Colo., 105-9, 83 Pac., 644; *Burkhart v. Meiburg,* 37 Colo., 187, 189, 190, 86 Pac., 98, 6 L. R. A. (N. S.), 1104, 119 Am. St., 279.

The lower court did not make any adjudication as to any water that had, or might hereafter, waste, seep or percolate into said creek from the plaintiff's lands, nor as to any unmeasured water that might thereafter escape from plaintiff's lands or ditches, but limited its findings and decree to a determination of the ownership of and right to use the water turned into said creek with the intention to retake and apply to a beneficial use, and this opinion is so limited.

The evidence discloses no attempt to establish any

right to injunctive relief, the court made no findings in relation thereto, and, recognizing no present right to such relief, granted it to take effect subsequent to the measurement by the plaintiff. Under these circumstances, such relief is unnecessary. Injunction operates *in personam,* and a court of equity will not lend its aid by injunction for the enforcement of a right or the prevention of a wrong, *in the abstract,* without proof of a well-grounded apprehension of immediate or future injury.—1 High on Injunctions, sec. 1-7; 1 Joyce on Injunctions, sec. 17 *et seq.*

The judgment of the lower court is therefore affirmed with directions to modify the judgment so that the plaintiff may be decreed to be the owner and entitled to the use of so much of the water turned into said creek by him as he may measure, recapture and actually apply to a beneficial use, due allowance being made for loss in transit from the point of measurement to the point of recapture; and so that no injunctive relief be granted at this time. Costs of this court to be borne by the parties equally.

Judgment Modified and Affirmed.

[No. 3875.]

FAGAN v. TROUTMAN, ADMINISTRATRIX.

1. TRIAL—*Directing the Verdict.* Where the evidence leaves the facts in any substantial degree doubtful, or fair-minded men might reach different conclusions therefrom, the issue must be left to the jury. So, even though there be no conflict in the evidence, if the result depends upon what inferences fair and reasonable men may draw therefrom.

2. GIFT—*Negotiable Paper—Endorsement,* is not necessary, as matter of law, to sustain a gift of negotiable paper, either *inter vivos* or *causa mortis.* The absence of an endorsement is matter of evidence to be considered with more suspicion in the case of an alleged gift *inter vivos* than in one *causa mortis.*

Error to Denver District Court. HON. H. C. RIDDLE, Judge.

Mr. JOHN R. SMITH and Mr. H. B. WOODS, for plaintiff in error.

Mr. EDWIN H. PARK, for defendant in error.

HURLBUT, J., delivered the opinion of the court.

This case, by agreement, was consolidated for argument with case No. 3704, *Nellie Fagan v. Susie Troutman, Admrx., et al.,* decided at this term of the court. Both cases involve proceedings concerning the same estate. The latter concerns title to real property, while the one at bar relates to personal property. In both, the real dispute concerns the right or interest of Nellie Fagan (plaintiff in error) in the property or estate of James Davenport, deceased. The evidence and testimony in both cases are closely related, and a number of the witnesses testified at both trials. In the case at bar, judgment was rendered in favor of plaintiff (defendant in error), from which this appeal was prosecuted.

By the pleadings it appears that plaintiff, as administratrix of the estate of James Davenport, deceased, brought action May 19, 1909, against defendant to secure possession of four certificates of deposit of the First National Bank of Denver, for various amounts aggregating $1,500; that two of such certificates, for $500 each, were issued October 9, 1908, another for $200 on January 29, 1909, and the remaining one March 15, 1909, for $300, all issued to the order of said James Davenport. The answer pleaded that defendant (stepdaughter of deceased) was in possession of said certificates at the time suit was brought, and claimed to be the owner and entitled to the possession of the same, basing such claim, first, upon an alleged gift *inter vivos* to her by deceased, second, upon an existing trust in her favor in said certificates. It also

admitted the issuing of the certificates, their dates and amounts, that Davenport was the payee therein, and that they had not been indorsed by him, but denied that Davenport had any title to the same at the time of his death. Both of said claims were controverted by plaintiff. These claims by defendant were the controlling and decisive issues for trial in the district court. The evidence tended to show that some months prior to his death, Davenport delivered the certificates in question to defendant in the presence of her husband, accompanied by a statement that they were hers, and by an injunction to keep them and take care of them and she would always have something. The defendant was not permitted to testify in corroboration of her husband, but if this sole living witness to this transaction, whose testimony was received, be credited, Davenport gave the certificates to defendant, saying, in substance, "that they were hers; for her to take good care of them; that she would always have something; and, in case anything happened to him, they belonged to her." The evidence also showed that from time to time after such delivery Davenport would come to defendant and temporarily obtain the certificates, or some of them, from her, and renew them at the bank. with additional interest, or return others in their places; that defendant retained possession of the certificates until the death of Davenport, and until suit was brought, that the certificates were never indorsed by deceased; that defendant, from the time of her infancy, lived with Davenport, until her marriage in 1907, and was treated by him as his own child, and she treated him in all respects as a father, and while such member of his family she rendered services and performed household duties for the benefit of deceased and members of the family generally. The evidence fails to show any specific or special contract between defendant and deceased for compensation for such work and services, nor is it shown

that defendant in any way was to pay deceased for her care and support during such time. It is further disclosed by the record that a jury was impaneled and sworn to try the issues; that at the beginning of the trial the lower court held that the burden of proof was upon the defendant by reason of the allegations in the answer, and also ruled the defendant might have the opening and closing; that after defendant's evidence was in and she rested her case, plaintiff, by her attorney, asked for a directed verdict in favor of plaintiff; whereupon the jury was excused from the courtroom, and it does not appear to have been subsequently reassembled. After some discussion between counsel, the court found the issues in favor of plaintiff, and rendered its decree accordingly.

It is strongly contended by appellant that the court's action in discharging the jury and passing upon the issues was a clear denial of her constitutional right to have the jury decide the issues by a verdict, and she particularly contends that the question as to whether or not there had been an absolute gift to her of the certificates of deposit by Davenport during his lifetime was, under the evidence adduced upon that point, clearly one for the jury to pass upon, as the evidence, both direct and upon cross-examination, showing the conditions, circumstances and statements of the alleged delivery thereof by Davenport, was evidence upon which honest men might reasonably differ as to the real intention of Davenport when he delivered the certificates to defendant. This court is of the opinion that appellant's last objection to the action of the court, as just detailed, is well taken. Many authorities of repute have been submitted by both parties concerning the right of a trial court to withdraw a case from a jury under circumstances similar to those appearing at the trial in the instant case. It would be difficult indeed to attempt to harmonize all of the authorities cited. We are satisfied that there is abundant credible

authority to sustain the conclusions we have reached. As we read the record, the controlling issue in this case is, was there a valid and complete gift of the certificates of deposit by Davenport during his lifetime to defendant? If we assume the affirmative, judgment would necessarily follow for defendant; if the negative, judgment would as surely go against her. There was considerable direct and cross-examination at the trial upon this issue. If all of the evidence appearing in the record, concerning Davenport's feeling and statements toward and concerning defendant, be considered in connection with that part of the evidence more particularly detailing what was said and done at the very time the certificates were delivered by Davenport to the defendant, it would seem to present an issue entirely proper and necessary to be passed upon by the jury. It is the contention of defendant that this delivery was intended as a gift *in praesenti,* and that the language used and other circumstances so show, while plaintiff insists that the delivery to the defendant was for safekeeping, as Davenport's depository only, and to be regarded as a gift *in futuro* in the event and at the time of his death.

The record indicates that the witness Jack Fagan, husband of defendant, was an honest witness, and, in giving his testimony, desired only to state in a plain, straightforward way all he knew concerning the matters about which he was interrogated. He was the only one present with Davenport and defendant at the time the certificates of deposit are alleged to have been given and presented to defendant by Davenport, and his evidence upon that point is all that appears in the record. A careful reading of the evidence upon this point fails to disclose that Davenport, at the time of delivery of the certificates, used any words clearly attaching a condition precedent to the passing of title to defendant. The phrase, "if anything happens to me, or I am hurt on a

building, they are yours," may or may not have been intended by the donor to be taken as a condition precedent to the gift. It may have only been intended by him as explaining to her that whatever might happen to him in the future she would still have something of her own. On the other hand, he may have intended it to be an absolute condition to the passing of title in the certificates to her, and that he did not intend the title to pass unless death or some serious injury should overtake him. We hardly think a court would be justified in saying under this evidence, as a matter of law, that no gift to the defendant was proven. We rather think it was a question upon which honest men might differ, considering all of the circumstances of the delivery, as to whether or not the donor intended it to be an absolute gift. The fact of absolute or conditional gift was a live issue in the case, and there was a fair doubt as to how or in whose favor the issue should be resolved. Certainly a jury of practical men, listening to the testimony, observing the actions and deportment of the witnesses upon the stand, and weighing all the evidence upon the point in issue, were in a position, under proper instructions from the court, to decide this important issue. We think this case falls within that of *In re Shell's Estate,* 28 Colo., 167, 63 Pac., 413, 53 L. R. A., 387, 89 Am. St., 181, wherein the supreme court, in passing upon the right of one of the parties to a directed verdict of the jury, used this language:

"It is true that, if the question depends upon inferences to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent, upright and reasonable men, then the question should be submitted to the jury under appropriate instructions, *even though there be no conflict in the testimony.*" [Italics ours.]

To the same effect is *Colo. & S. Ry. Co. v. Lauter,* 21 Colo. App., 101, 121 Pac., 137, wherein our late lamented associate, Judge Walling, used this language:

"Therefore, when the facts, or the inferences to be drawn therefrom are in any substantial degree doubtful, or fair-minded men might reach different conclusions from the facts, the only proper rule is to submit the question to the jury for determination."

To the same effect: *Ladd et al. v. Williams,* 104 Mo. App., 390, 79 S. W., 511; *Merritt v. State,* 42 Tex. Civ. App., 495, 94 S. W., 372; *Gansberg v. Sagemohl,* 73 N. Y. S., 984, 67 App. Div., 554. The list might be extended, but we deem it unnecessary. We are well aware of what appears to be the settled rule that *nisi prius* courts have the power, and it really becomes their duty in proper cases, to direct the verdict of the jury. For instance, where there is no evidence whatever to support an issue contended for by a party to an action; or where all the evidence taken in support of such issue shows as a matter of law it cannot be sustained, etc. But it is not within the province of a trial judge to pass upon the probative force of evidence and take the case from the jury, when as above stated, a proper decision depends upon inferences in the consideration of which there is room for a substantial difference of opinion between intelligent, upright and reasonable men. In all such cases the question should be submitted to the jury under proper instructions, even if there be no conflict in the testimony. This should be and probably is the rule in all civil cases, but its applicability applies with unusual force in this case. The trial judge thought that the evidence conclusively showed that no absolute gift of the certificate had taken place. In this respect we are at variance with his conclusions. We think the evidence taken as a whole generated a doubt upon that issue which the jury should have resolved.

We do not think the defendant's case was prejudiced in any manner by the evidence which showed that after the delivery of the certificates to defendant Davenport from time to time obtained them from her temporarily for the purpose of adding the interest or otherwise increasing the amount represented by them. In fact, it might be considered by the jury a circumstance tending to establish the *bona fides* of the gift. There is no evidence whatever that Davenport ever took back or received from defendant the money, or any part thereof, represented by said certificates. This fact, at least, is one of the circumstances of the case to be considered with all other circumstances and facts disclosed at the trial.

It is admitted that none of the certificates of deposit were indorsed. The weight of authority seems to establish the rule almost beyond controversy that the indorsement of an instrument of the character we are considering is not necessary as a matter of law to sustain a gift *inter vivos* or one *causa mortis*. The absence of the indorsement is, however, a proper matter for evidence, and might be considered by a jury, in case of a gift *inter vivos*, with more suspicion than in one *causa mortis*.

There are some other assignments of error which have been ably presented by counsel for both parties, but as the case must be reversed for the reasons above given, we deem it unnecessary to further extend this opinion.

Reversed and Remanded.

[No. 3887.]

THE GRAND FRATERNITY V. CLIFF.

1. BENEFIT SOCIETIES—*Consolidation—Rights of Members.* Where two fraternal benefit societies of the same general purpose consolidate, adopting for the consolidated body the name and charter rights of one of them, the consolidated body agreeing to account for the funds it will receive from the original societies, with future receipts from the mem-

bership of each, "according to the respective contracts of the members," and "for the equitable and complete protection of the memberships" of each of the orders, and an estimate or accounting has been had for the purpose of the consolidation, and the consolidated order issues to the members of one of the original societies a certificate or rider to his policy, agreeing to assume liabilities under the contracts held by them, it may well be inferred, without proof upon the question, that whatever was necessary to be done on the part of the original society to consummate the consolidation was done, and that its funds and securities were received by the consolidated body.

2. —— *Surrender Values.* Where, in such case, the consolidated body recognizes the liability of its funds for death losses, under certificates issued by one of the original societies, the same funds are subject to the payment of surrender values if there is no stipulation to the contrary in the agreement of consolidation.

3. —— *Right of Member to Resort to the Courts.* Where, in the constitution of a benefit society, and the statute controlling it, there is nothing requiring a member to present his claim and exhaust all remedies within the order, before applying to the courts a member whose right is denied may at once institute his action.

Error to Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

Mr. CHARLES W. WATERMAN and Mr. CALDWELL MARTIN, for plaintiff in error.

Mr. S. S. ABBOTT, for defendant in error.

BELL, J.

On the 19th day of November, 1903, the plaintiff in error, The Grand Fraternity of the state of Pennsylvania, and the United Moderns of the state of Colorado, were fraternal benefit associations, having the same general purposes and each occupying a different membership territory. Said associations agreed and stipulated that a consolidation would extend and improve the field of each, making it practicable for the one organization to rapidly extend its transactions into all of the desirable states of the Union, under one management, saving expense, strengthening both associations and facilitating the re-

ceiving of other orders preparing to unite with said consolidated order, for the purpose of forming one Grand Fraternity on a safe, sound, economical, and equitable basis. It was also agreed and stipulated, at the time that the supreme executive bodies of both orders had met, considered, authorized and directed that said two associations be consolidated, that the members of each order should, without payment of fees or further act, be recognized and accepted as members of the consolidated order; that the name of The Grand Fraternity should be retained and adopted by the consolidated organization; that said consolidated organization should operate under the charter of The Grand Fraternity, granted by the state of Pennsylvania; that the insurance or beneficiary contracts of each of the orders should remain intact, and be assumed by the consolidated order, according to the terms and conditions of said contracts; and that The Grand Fraternity might, by a suitable rider to be attached to such contracts or certificates of insurance held by the members of the United Moderns, extend to such members such additional options or privileges as the consolidated order might elect. It was further stipulated that an accounting should be taken of the funds and the affairs of each of the orders uniting, and the same, together with future receipts from their memberships, be received and equitably accounted for by The Grand Fraternity according to the respective contracts of the members, for the equitable and complete protection of the memberships of each of the orders; that the funds of neither should be confused in such manner as to interfere with the fair and equitable treatment of such memberships, the intention being strictly to continue and fully protect the interest and membership of each order, according to the plan of each, including a like accounting for the future premiums of the members according to the terms of their contracts, "equitably granting to the mem-

bership of each of the orders hereby consolidated the advantage accruing from such consolidation.

"That provision shall be made for the liquidation of any obligations of the United Moderns, and that the funds of the order shall be merged into the funds of the consolidated order. To give effect to the purposes hereof the funds and property of the united orders shall by proper transfer be conveyed to the consolidated order. It is further stipulated that the securities and the funds conveyed by the united orders to the consolidated order shall be of such amount and character as shall, according to the constitution and laws of the united orders and the contracts outstanding, fully cover the beneficiary and guarantee fund and reserve fund, according to the requirements of the beneficiary contracts outstanding, and the constitution and laws of the respective orders, the value of which has been determined and the required securities and funds to cover found intact and ready for delivery."

After such consolidation The Grand Fraternity issued to the defendant in error and his assignor a certificate or "rider," stating, among other things:

"The consolidated order, The Grand Fraternity, accepts you as a member and will pay all benefits provided in said beneficiary certificate, in the manner and as prescribed in the constitution, laws, rules and regulations of said United Moderns."

On the 17th day of April, 1903, William A. Cliff, defendant in error, and Bessie R. Cliff, his wife, became members of the United Moderns, and continued their memberships therein, and paid all dues and assessments to said United Moderns up to the time of the consolidation, and thereafter to The Grand Fraternity, under the terms and conditions of the consolidation, for a period of over five years from the date of their memberships in

the United Moderns. Bessie R. Cliff assigned her certificate of insurance to her husband, the defendant in error, who, on or about the 28th day of April, 1908, tendered a surrender of the two certificates then held by him to The Grand Fraternity and demanded the surrender values thereof, which amounted to $117.00 on the one issued to himself and $97.00 on the one issued to his wife or a total surrender value of $214.00. Said Grand Fraternity declined to pay this amount as demanded, and in its answer assigns as a reason for its refusal, among other things:

"That at no time since the said 19th day of November, 1903, has there been funds in the possession of the defendant, The Grand Fraternity, received from the said United Moderns in excess of the premiums required to pay matured benefit claims which from time to time accrued and became payable upon certificates of membership issued by the said United Moderns, * * * And this defendant further says that the plaintiff is not at this time entitled to any surrender privilege whatsoever for or on account of his said certificate of membership issued as aforesaid by the said United Moderns."

Counsel for plaintiff in error vigorously insists that, while it is stipulated and agreed that the funds and securities of the United Moderns were adequate to secure the performance of its outstanding contracts at the time of the consolidation, including those under consideration, it has not been shown that those funds and securities have been turned over to The Grand Fraternity.

As against this contention it has been shown that the merger of the orders was agreed upon and provided for, that an estimate or an accounting had been made for the purpose of consolidation, and that, after the consolidation was effected, The Grand Fraternity issued to the members of the United Moderns its certificate or "rider" in which it agreed to assume the liability under

the contracts held by them, and we may well infer that whatever was necessary on the part of the United Moderns to consummate the contract of consolidation was done, and that its funds and securities were received by The Grand Fraternity accordingly.

The plaintiff in error further complains that the court erred in refusing to admit proof of a lack of funds in its hands, received from the United Moderns and its members, to pay the surrender values of the certificates as demanded. The evidence thus offered was to the effect that The Grand Fraternity had been paying out of the consolidated funds many claims under certificates of the United Moderns, and at the time of the demand had no funds, received from the United Moderns, with which to pay surrender values. The court excluded the evidence as offered, and held that the defendant in error had a right to have his status in the consolidated order determined, and, if entitled to a judgment, the question of lack of funds with which to pay such judgment should be no bar thereto, and that the question of proper funds could be raised and determined when such judgment was sought to be enforced. It is evident that The Grand Fraternity recognized the liability of its funds, the consolidated funds, to the payment of death losses under the certificates issued by the United Moderns, and, under the conditions of the consolidation, we cannot see why the same fund should not be subject to the payment of surrender values.

The plaintiff in error insists that the defendant in error should have presented his claim to The Grand Fraternity, and, when payment thereof was refused, should have appealed from one authority to another until all remedies in the organization were exhausted before resorting to the courts.

The constitution and laws of the United Moderns provided for various methods for presenting claims and

appeals thereon, which might consume a long period of time if pursued, but the United Moderns became defunct upon the consolidation of the orders, and its boards had not met for five years, and, at the time the defendant in error withdrew from the Grand Fraternity, and demanded the surrender values of the certificates held by him, the latter had no provision in its constitution and laws that required certificate holders to present their claims and exhaust all remedies within the order before commencing action on their claims in the courts. However, before applying to the courts, the defendant in error requested settlement of his claims from the president of The Grand Fraternity, and served written notice of his demands upon The Grand Fraternity, but payment of his demands was refused and liability denied for the same reasons, presumably, as were set up in the pleadings of the plaintiff in error, and as was urged by it upon the trial; and it is evident that an exhaustion of the remedies by appeal in this case would have proven fruitless in the light of the history of the conduct of The Grand Fraternity.

There is a very small sum involved herein, and each party hereto has probably expended as much in litigation of the matter as the amount involved, and we think that substantial justice was awarded by the trial court.

The Grand Fraternity does not deny its ultimate obligation to pay the claims herein demanded, but seeks to avoid payment out of the consolidated funds and to limit the payment of surrender values to the direct results of the funds and resources received by it from the United Moderns and its members. It does not contend that it did not have available consolidated funds that might have been applied in the liquidation of these surrender values. We do not think that the defendant in error understood that the agreement of consolidation limited the payment of surrender values only to funds received from the United Moderns, or should have so understood, at the

time he consented to look to The Grand Fraternity for the payment of those values and while he was paying to it dues and assessments for a period of almost five years.

The stipulations of the consolidation show that The Grand Fraternity was to accept all new members in its own name for the benefit of the consolidated orders; that it had examined the funds and resources of the United Moderns, and that such were sufficient to pay all claims which might arise under certificates issued by said United Moderns, and that these funds should be merged into the funds of the consolidated order; and, while the consolidated order agreed to preserve these funds as a security for the payment of matured benefit claims arising under the certificates issued by the United Moderns, it also agreed to assume the responsibility for the payment of surrender values becoming due and payable under such certificates. There is no indication in the stipulations of consolidation that The Grand Fraternity should be a mere trustee to liquidate the claims and apply the funds received by it from the United Moderns to such claims arising under the certificates issued by the United Moderns and outstanding at the time of the consolidation.

We think, from the nature of the consolidation and the conduct of The Grand Fraternity, that the judgment of the trial court should be, and is hereby, affirmed with costs.

Affirmed.

[No. 3898.]

THE MESA COUNTY NATIONAL BANK v. BERRY.

1. SALE—*Possession Remaining With the Vendor.* A bill of sale, executed by the husband alone, of goods belonging to husband and wife, possession being retained by the two, will not prevail as against a subsequent sale by the two, accompanied by the delivery of the possession.

2. ESTOPPEL—*By Conduct—Must Be Pleaded.* In order to be effective as a defense.

3. ATTORNEY—*Right of Client to Discharge.* One who has employed counsel to institute and prosecute an action is entitled to at any time abandon his purpose, forego his rights, and discontinue the litigation. The discharge of the attorney, in such case, is not without cause. The attorney is entitled to no more than the reasonable value of the services actually rendered, with, in addition, such damages as he may have sustained by the rescission of his contract of employment.

The rule is the same even where the compensation of the attorney has been agreed upon and paid in advance. He is entitled to no more, in such case, than where there has been no agreement or payment.

In estimating the damages sustained by the attorney by the rescission of the contract for his employment, the loss of the attorney's opportunity to earn a larger sum from his client if he had continued the litigation is not to be considered.

Error to Mesa District Court. HON. SPRIGG SHACKLEFORD, Judge.

Messrs. LOGAN & MILLER, for plaintiff in error.

Mr. SAM B. BERRY, *pro se.*

CUNNINGHAM, Presiding Judge.

The controversy out of which this case arose involves certain household goods valued at about $600. These goods were formerly the property of Sherman W. Moody, a jeweler at Grand Junction, and the principal stockholder of the Moody Jewelry Company. The goods were located in Moody's home, which had been leased, furnished, to Berry, the defendant in error. Moody and the Moody Jewelry Company were heavily indebted to the plaintiff in error, The Mesa County National Bank. To satisfy this debt Moody had caused an assignment to be made of the jewelry company stock, and had transferred to it certain equities in real estate, including the home. The agent of the bank was in possession of the stock of jewelry. Being dissatisfied with his transactions with the bank, Moody, on or about April 21, 1909, employed Berry, who is an attorney, to bring an action or actions against the bank for the purpose of annulling the deeds

which he had made to the bank or to the jewelry company, and, as compensation for such services, Moody made a bill of sale to the household furniture to Berry. Berry testifies that he received the bill of sale and transfer of the goods as full payment in advance for the services to be by him rendered for Moody. Shortly after making this bill of sale to Berry, Moody left the state and telegraphed Berry that he had decided to relinquish all claim to the goods, and directed Berry to turn over everything, presumably to the Moody Jewelry Company directly, and thereby indirectly turning it over to the bank. This telegram was followed by a letter confirming it. Thereafter Berry rendered no services to Moody. Before receiving the telegram, he had made certain investigations, and had drawn a complaint, but had not filed the same, and said complaint never was filed. On May 6th, the bank brought an attachment proceeding against Moody and the Moody Jewelry Company, and seized the household goods in question. Berry gave a custodian's receipt to the sheriff, and, by an amicable arrangement of this sort, remained in possession of the goods. On August 4, 1909, Berry filed his petition in intervention in said attachment suit, claiming title to the household goods, by virtue of his bill of sale. Moody never made any appearance in the attachment proceeding, and the case proceeded to trial on the merits of the petition in intervention which Berry had filed, and the question presented for our consideration is the respective rights of the bank and Berry to the household goods. The trial court directed the jury to return a verdict in favor of the intervenor, which it did, and, from a judgment thereon in favor of the intervenor, Berry, the bank brings the case here on writ of error.

1. The bank introduced on the trial a bill of sale from Moody to the Moody Jewelry Company, which bill of sale purported to transfer the household goods, and the bank now insists that as this bill of sale antedated

the one under which Berry claims, it defeats the latter. In this attachment proceeding the bank admits, in its answer to Berry's petition in intervention, that Moody and his wife were the owners and in possession of the household goods at the time the bill of sale to Berry was made. Moreover, the bill of sale to the Moody Jewelry Company was never signed by Mrs. Moody, whereas the bill of sale to Berry was signed by both Mr. and Mrs. Moody, and Berry was in possession of the goods at all times, as tenant before taking the bill of sale, and claiming to be the owner thereafter. In these circumstances we are not disposed to allow the contention of the bank that the household goods belonged to the jewelry company.

2. At the time of the attachment suit, as we have already pointed out, the sheriff, after having levied on the property, by a written instrument appointed Berry custodian, without fees, compensation or cost to the sheriff or the plaintiff in the case, the plaintiff in error here. On this written instrument Berry endorsed the following: "I hereby accept the appointment as custodian of the above mentioned (meaning the household goods) on the terms and conditions therein stated, and I hereby waive and relinquish all right to fees or compensation as such custodian." This endorsement was dated and signed by Berry. The bank now contends that this estops Berry from claiming title to the goods. There might be merit in this contention had it been pleaded by the bank, but no attempt was made by the bank, in its answer to Berry's petition in intervention, to set up this custodian's receipt or to plead estoppel.

"Matters of estoppel *in pais* to be made effective as a defense must be pleaded."—*Prewitt v. Lambert*, 19 Colo., 11, 34 Pac., 684.

If the bank had pleaded the transaction between Berry and the sheriff in its answer to the petition in intervention, it is possible that Berry might, by replica-

tion, have set up some satisfactory explanation and proven the same on the trial, thus avoiding its effect.

3. The principal contention between the parties, and the one to which they have devoted the greatest attention, may be thus stated: the bank insists that a client has a right at any time, and for any reason satisfactory to himself, to discontinue any litigation which he has instituted, and may halt and discharge his counsel in any contemplated litigation not yet instituted. There can be no serious question about the soundness of this contention. Indeed, it is not disputed by defendant in error. But the bank goes further, and insists that where an attorney has been paid in advance to commence a specific suit, and his client, exercising his right to discontinue the preparation for such litigation, entirely abandons all intention of bringing the same, he has a right to rescind the contract of employment which has been entered into between himself and his counsel, and recover back from his attorney the fees which he has paid in advance, which fees were by the contract to cover all services to be rendered, abated only by the reasonable value of the services of counsel that have been rendered prior to such rescission of the contract. This contention of the bank Berry stoutly insists is unsound; that, being ready and willing to proceed with the contract of employment, and to in every way carry out the conditions imposed upon him by its terms, he insists the attorney has the right to recover the full contract price, or where, as in this case, he has received in advance the full amount of the contract price, the law permits him to retain the same. The question thus stated is the one we must determine.

The trial court adopted Berry's view, and refused to permit the bank to introduce any evidence showing the value of the services which Berry had rendered prior to the receipt of the telegram from Moody. That he, Berry, had not performed services equal in value to the entire

amount of the fee which he received in advance is not and cannot be disputed.

Many cases have been called to our attention by counsel for the respective parties, but only a very few of them are directly in point. In some of the cases the counsel acquiesced in the act of his client in discharging him and substituting other counsel. In others the counsel was discharged for misconduct. Cases falling in either of these classifications are not in point, and can throw no light on the question here in dispute, since, of course, in such cases counsel could only recover on *quantum meruit,* if at all. No one will seriously contend to the contrary. In a large number of cases which have been called to our attention, the attorney had been employed on a contingent fee, and either before the case was instituted, or before it had been finally determined, the client settled with his adversary. Since it would be impossible to determine whether the litigation thus settled would have been prosecuted to a successful determination, and since the law favors settlements, most, if not all, the courts have ruled that in circumstances of this character the attorney must recover for the value of his services, rather than upon the contract. Several courts have ruled that where an attorney has been employed upon a specific contract, and is to receive a sum certain for his services, but before the litigation contemplated by the contract has been concluded his client discharges him without cause, he may recover the full amount of the contract price. This doctrine appears to have been first laid down in *Baldwin v. Bennett,* 4 Cal., 392, and frequently affirmed thereafter by the supreme court of that state, and followed in New York and Washington.—*Sessions v. Warwick,* 46 Wash., 165, 89 Pac., 482; *Webb v. Trescony,* 76 Cal., 621, 18 Pac., 796; *Bartlett v. Savings Bank,* 79 Cal., 218, 21 Pac., 743, 12 Am. St. Rep., 139; 3 Am. & Eng. Enc. of Law (2nd ed.), 426; 4 Cyc., 984.

In most, if not all, of these cases it will be found that the attorney was capriciously or unjustly discharged, and other counsel substituted, and the litigation, after his discharge, proceeded. We think cases determined on such state of facts are not in point. It is our view that where counsel is discharged because his client does not desire to press the litigation which counsel was retained to conduct, it cannot be said that the discharge was without cause, and under such circumstances it would seem that the attorney's right of recovery should be limited to the value of the services rendered prior to his discharge, plus his damages, if any he may have sustained, by reason of the rescission of the contract.

We are aware that in *Riehl v. Levy,* 43 Misc., 59, 86 N. Y. Sup., 464, the supreme court of New York, under facts very similar to those involved in the instant case, ruled differently, but as no authorities are cited in the Riehl case, and little, if any, original reasoning indulged in, we are not disposed to follow the rule there announced. Moreover, the judgment rendered by the lower court in the Riehl case denied the attorney's right to any compensation whatever, notwithstanding he had, as in the case now before us, rendered valuable services before his contract of employment was rescinded, hence the reversal of the opinion by the supreme court was proper for that reason.

The view we take finds support in the following cases: *Henry v. Vance,* 3 Ky. Rep., 72; *Goodin v. Hays,* 28 Ky. L. Rep., 112, 88 S. W., 1101; *Polsley v. Anderson,* 7 W. Va., 202, 23 Am. Rep., 613; *Tenney v. Berger,* 93 N. Y., 524, 45 Am. Rep., 263; *Elwood & Lowrie v. Wilson,* 21 Ia., 523; *Seemes v. Clark,* 73 Md., 19, 20 Atl., 127; *Scobey v. Ross,* 5 Ind., 445.

In an address delivered in the Page Lecture Series, 1909, before the senior class of the Sheffield Scientific

School, Yale University, Mr. John Brooks Leavitt of the New York bar used the following language:

"It is against public policy to allow either lawyer or client to hold the other against his will. So sacred is this right in both that it cannot be overcome by contract. Public policy stands in the way. It may well be that where the services of a lawyer are of a clerical nature, and he has been engaged on a salary for a specified time, he may not be discharged before the time without liability for his salary in full, as in the case of any employe, but in respect of services as an adviser or in the conduct of litigation, either may terminate the relationship without bringing himself under any liability for payment, or for unperformed services."

We assume that Mr. Leavitt means that upon the termination of the relationship as fixed by the contract, the client, upon rescinding the contract, brings himself under no liability for payment for unperformed services. For services already performed, of course, the client is clearly liable, as well as for any damage which the rescinding of the contract may have occasioned the attorney, but in fixing such damages the loss of the attorney's opportunity to earn a larger sum of money from his client, had he, the attorney, been permitted to continue the litigation, may not be taken into consideration. It is not necessary to a determination of the case before us that we unreservedly adopt and apply the view expressed by Mr. Leavitt. Where a client discharges his counsel from some ulterior and reprehensible motive, rather than a motive which the law favors and encourages, it would seem but common justice that he, the client, should not be permitted to profit thereby. Mr. Leavitt points out in this lecture, which appears in a little volume entitled, "Everyday Ethics" (Yale University Press, 1910), that in one very important case counsel for neither side called the atten-

tion of the trial court or the supreme court to this question of public policy, but the suit was defended on the sole ground that no agreement of employment had been consummated. In very few of the cases which we have examined, and we have examined a large number not cited in the briefs, is the question of public policy presented or considered.

We confess we are unable to discover any difference in principle between a contract of employment wherein the amount of the attorney's compensation is accurately determined and stated, and an employment wherein the amount to be paid has not been determined. The attorney who is discharged in the one case may lose as much as in the other. If he be permitted to recover the full contract price, when that sum is stipulated, no good reason occurs to us why he should not, under circumstances in all respects similar, be permitted to recover the full value for what his services would have been worth had he not been discharged. It cannot be said that by fixing or agreeing upon the fee in advance the client becomes irrevocably bound to his attorney, or that he can only regain his freedom and be permitted to discontinue the litigation by paying the full fee without reference to the amount of services which have been rendered, nor can the fact that the attorney has been so fortunate as to collect his entire fee in advance be permitted to change or affect the rule.

To permit an attorney to collect in advance and retain the full fee stipulated in a contract where he has performed no service, and is prevented from performing any by conduct on the part of his client which the law professes to commend and encourage, would be to permit a broad principle founded on public policy to be totally eclipsed by a principle resting on the narrower basis of a selfish personal interest. The adoption of so sordid a rule would be a reproach upon our jurisprudence.

It was the right, under the circumstances here detailed, of Moody to cancel his contract with Berry, and it was Berry's duty, upon receiving just compensation for the services which he had already rendered, to turn over the household furniture which he had received as payment in advance for the entire fee to Moody's creditor, to the end that Moody's liability might be thereby decreased.

For error in the exclusion of testimony offered on behalf of plaintiff in error for the purpose of showing the reasonable value of the services rendered by defendant in error prior to the rescission of his contract of employment by his client, the judgment of the trial court is reversed and the case remanded.

Reversed and Remanded.

[No. 3649.]

MONTE VISTA CANAL CO., ET AL. v. CENTENNIAL IRRIGATING DITCH CO.

1. WATER RIGHTS—*Change of Point of Diversion—Effect of Decree.* A decree granted under the provisions of sections 3226-3231 of the Revised Statutes is, in effect, a modification of the general decree adjudicating priorities in the water district.

2. —— *Who May Apply For.* A mutual ditch company, carrying water for the use of its members only, though neither owning or irrigating any land, may, in virtue of its relation to its shareholders and as their trustee, petition under the statutes.

3. —— *Evidence—Burden of Proof.* The burden of establishing that the proposed change will not injuriously affect the vested rights of others is upon the petitioners. The protestants have not the burden of establishing the contrary.

The question what will be the effect of the change, whether injurious or harmless, is the ultimate fact to be determined from evidence of the conditions which have previously prevailed and the conditions which will ensue if the change is permitted. The opinions of

witnesses not based upon any facts or conditions in evidence will not satisfy the rule nor make a *prima facie* case.

And the judge presiding is not at liberty to act upon his personal knowledge.

The evidence examined and held entirely insufficient to sustain the petition.

4. —— *When the Change Will Be Granted.* Where it appears that substantial injury must inevitably result to those protesting, the fact that, by allowing the change, many more acres will be irrigated and many more persons served, will not avail to support the application.

5. TRIALS—*By the Court.* The judge presiding is not to refer to his own knowledge to supply defects in the evidence of essential facts.

Appeal from Costilla District Court. HON. CHARLES C. HOLBROOK, Judge.

Mr. IRA J. BLOOMFIELD, Messrs. CORLETT & CORLETT, Messrs. GOUDY & TWITCHELL, for appellants.

Mr. JESSE STEPHENSON, for appellee.

KING, J., delivered the opinion of the court.

The Centennial Irrigating Ditch Company, a Colorado corporation, obtained a decree of the district court in and for the county of Costilla, changing the point of diversion of seventy-five cubic feet of water per second of time from the headgate of the Centennial ditch, through which it had been diverted for thirty-five years or more, to another point about two miles further up the Rio Grande river. The Monte Vista Canal Company, The San Luis Valley Irrigating District, The Rio Grande and Piedra Valley Ditch Company, and others, junior appropriators, protested against the change prayed for, and appealed from the judgment granting the same.

1. Appellants deny the right and capacity of the petitioner to maintain this statutory proceeding, the denial of such capacity being predicated on the fact that petitioner was neither the owner nor user of water for

the purpose of irrigation. The statute invoked reads as follows:

"Section 1. Every person, association or corporation desirous of changing, in whole or in part, the point of diversion of his or its *right* to *use water from any of the streams* of the state shall present a petition to the district court from which the original decree issued, * * * praying that such change be granted."—Session Laws 1903, page 278.

Independent of the statute, and prior to its enactment, any person or corporation having the right to divert water from the natural streams of this state had also the qualified right to change the place of its diversion, but subject to the condition that the vested rights of others to the use of water from such stream should not be injuriously affected thereby; and after an adjudication of the water rights under our system of determining priorities as between ditches, subject to the further condition that an order or decree of court permitting such change be obtained. This promissory decree becomes, in effect, a modification of the general adjudication decree, in so far as the place at which the water may be diverted through any ditch is changed from that fixed in the general decree, and without which modification the state officers charged with the distribution of water may not deliver it elsewhere. The petitioner was the owner of the Centennial ditch. Under a general adjudication, about eighty second feet of water was permitted to be diverted from the stream at a point there designated, and thence to flow into and through said ditch, for the use of the persons lawfully entitled thereto. Petitioner was a corporation or association known as a mutual ditch company, carrying water for the use of its stockholders only, maintaining and operating the ditch solely for their use and benefit, and, although it owned no land except for its right of way, and as a corporation irrigated no land for

its own use, nevertheless we think that by virtue of its relation to its stockholders in whom was vested the "right to the use of water from the stream," the corporation had the right, as trustee for such stockholders, to institute and prosecute the proceeding.

Moreover, we think the statute, in so far as it relates to the person who may pray for a change, has the same meaning as if it had provided that "every person, association or corporation desirous of changing, in whole or in part, the point of diversion of any water which he or it has the right to divert from any of the streams of the state, shall present a petition," etc.

2. It is not shown that all appropriators of water from the Rio Grande river in said water district, junior in right to petitioner, were served with notice of the hearing on the petition, and for that reason it is urged that the court did not obtain jurisdiction to try the issues. The court found that all persons whose rights would be affected had been duly notified. This finding was based upon a showing of service upon a multitude of persons and corporations, and as there is slight, if any, evidence in the record to overcome that finding, it will not be disturbed.

3. That the evidence does not warrant the decree appealed from is quite clear. It is settled law that a person who seeks to obtain an order of the court changing the point of diversion of his adjudicated water right must prove by competent and sufficient evidence that the change sought will not injuriously affect the vested rights of others. The burden of proof in the proceeding is upon the petitioner, and not upon the person who resists the application for such change.—*Fort Lyon Canal Co. v. Chew,* 33 Colo., 392, 81 Pac., 37; *Vogel et al. v. Minnesota Canal Co.,* 47 Colo., 534, 107 Pac., 1108; *New Cache la Poudre Irrigating Co. v. Water Supply & Storage Co.,* 49 Colo., 1, 111 Pac., 610; *Farmers' High Line etc. Co. v. Wolf,* 23

Colo. App., 570, 578, 131 Pac., 231. The petitioner did not bear this burden. On its behalf, two witnesses gave as their opinions that the change contemplated would not injuriously affect others; but such opinions were not based upon any facts or conditions testified to by them, or otherwise in evidence at the time they were given, from which such inference can by any exercise of the imagination be drawn. The question of resulting effect (whether injurious or non-injurious) is the ultimate fact to be ascertained and determined by the court from all the evidence; that fact is its conclusion, reached by inference or deduction from evidence of conditions that prevailed before the change, and of conditions that will prevail thereafter. It must be obvious that the mere expression of opinion by a witness, or witnesses, will not satisfy the requirement of the rule as to *prima facie* showing and the burden of proof in a proceeding of this kind. Protestants' motion for non-suit and dismissal of the petition, submitted when petitioner closed its evidence in chief, might well, and we think should, have been granted; but, having been denied, the protestants, appellants here, assumed the burden of showing injury to their vested rights to the use of waters of the stream, and, we think, successfully carried it.

An extended or detailed statement of the evidence would serve no useful purpose. A brief review thereof will suffice. The testimony on all material conditions and circumstances is practically undisputed. It shows that the Centennial ditch, as theretofore used, was located upon the lowlands near the river; that practically all land irrigated therefrom was what is called "first bottom" lands lying between the ditch and the river, and so situated that all seepage and other return waters reached the river certainly and quickly after irrigation, and above the headgates of several other ditches having decrees in the aggregate exceeding 100 second feet of water, much,

if not all, of which was senior in priority to some of the protestants' water rights; that these return waters were, and always had been, large in amount, augmenting the waters of the stream to such an extent that one ditch having an early priority of forty-five second feet was supplied entirely from the return waters from the Centennial ditch after its stockholders had been irrigating for about twenty days, and other such ditches were also supplied in whole or in part. It is further shown by the evidence that the lands under the Centennial ditch, with few exceptions, have been and are what is known as natural hay lands, extending to or near the river bank; that the waters have been poured upon such lands in floods, and, hastening over them, returned to the river, diminished but slightly in quantity as compared to the diminution under ordinary methods of irrigation as applied to other crops. This accounts for the unusual, and apparently excessive, amount of return waters to which the witnesses testified. These conditions and consequences were shown by water commissioners and other disinterested witnesses, and were not disputed. The direct effect of this supply to ditches below the Centennial ditch has been—and manifestly will continue to be, if point of diversion be not changed—that other ditches farther up the stream, including some of the appellant's, are supplied with water for a longer time each season than would be possible if the senior rights below the Centennial ditch are to be filled from other waters of the river, as they must be, should the return waters mentioned be withdrawn. It was further shown that at the new location, if the change be made, the water will be taken out of the stream and carried to and upon a mesa or upland for a number of miles, and then that approximately forty second feet of the water will be carried across a divide to and used upon a large body of land from which the seepage and other return waters will flow into Rock creek and

Spring creek, and thence into the Alamosa river, and by it be discharged into the Rio Grande river far below any point where any portion thereof can be utilized by any of the ditches in said water district. It is further shown by the evidence, and undisputed, that the Centennial ditch, where located, was and is supplied with a considerable amount of water reaching it along its course, arising from seepage from irrigation upon the higher lands, and for that reason would not require as large a draft upon the river to supply the needs of the lands under the ditch as it otherwise would; that this source of supply will not be available for the ditch at the new point of diversion, making it necessary to draw the entire supply directly from the stream. This supply was estimated to be about ten second feet during portions of the season. Upon this state of facts; the foregoing conditions surrounding the carriage and use of water for thirty-five years, and the consequences arising therefrom; the change in such conditions, and the consequences which will arise therefrom if the change in point of diversion be granted, and the carriage and use of water be as contemplated and intended, all witnesses for the appellants—and they were many—testified that a much larger draft upon the natural waters of the stream would be demanded in order to supply the ditches on the stream having adjudicated water rights; that many, if not all, the junior ditches would be shut down earlier to supply the senior priorities. and that therefore the change would necessarily, substantially and injuriously affect the rights of others to the use of water from said stream; and we think that the evidence conclusively shows that such injurious effect would be the necessary and inevitable result of the change prayed for, and granted by the trial court. It is true that some evidence was offered tending to show that, notwithstanding the contemplated withdrawal from this ditch, and from use as heretofore, of approximately one-half

its decreed water rights, the land theretofore irrigated by it would in the future be irrigated by other ditches taken from the same river. That fact may, and doubtless will, lessen the *quantum* of loss caused by the change. But no attempt was made to show that the same quantity, or approximately the same, will be used upon said lands, and, so far as appears from this record, the injury to protestants will be substantial and inevitable. The evidence shows that a land company purchased a large body of the lands under the old ditch, and then sold the land without the water rights, or, in some instances, with a small portion thereof, intending and attempting by this proceeding to take about one-half the waters of the ditch to another water shed, as hereinbefore mentioned.

The evidence in this case brings the petitioner within and subject to the bar of the established rule that, as against the change sought, the junior appropriators have a vested right to the continuance of conditions that existed on the stream at and subsequent to the time they made their appropriations, including the general method of use of water therefrom.—*Vogel et al. v. Minnesota Canal & Res. Co.*, 47 Colo., 534, 107 Pac., 1108; *Larimer Co. Canal v. Poudre Valley Res. Co.*, 23 Colo. App., 249, 129 Pac., 248; *Farmers' High Line etc. Co. v. Wolf*, 23 Colo. App., 570, 131 Pac., 231.

The judgment of the trial court seems to be predicated upon the following findings of fact and law:

"It appears that the purpose of wanting to make this change is to get the new ditch on higher ground and for the purpose of taking a portion of the waters of this ditch, or of the decree, from lands near the river and using these waters on lands further from the river. The lands from which a portion of these waters are to be withdrawn are to be irrigated with water taken from the same river through another ditch. It is objected that a portion of these waters, carried further away from the river

for use in the irrigation of other lands, will return to the river, by seepage, or otherwise, further down the river, and, by reason of that, vested rights will be injured.

"There is some contention also, that it may take more water to irrigate the farm lands further away from the river than is required for the meadow lands nearer the river. If we may take judicial knowledge of the records of this court, it must appear that a great many ditches and canals, inclusive of the ditches of these objectors, carry water much further from the river, for use in irrigation, some of them taking water ten, twenty, thirty or even forty miles away from the river, and I think it is well known by all who have given any careful attention to that, that instead of this fact proving an injury, it has proven beneficial, for the reason that the greater the area that is covered with water in irrigation, the more water finds its way back to the river as seepage, in seasons of the year when water becomes scarcer: That the river carries more water by reason of this seepage, upon account of the enlarged area that is covered by water in irrigation. The water which might otherwise flow away and leave the country, in times of sufficiency of water, would instead, by reason of a large area being irrigated, be seeping back by means of percolation and seepage, reaching the river during all portions of the year, so that the flow in the river would be more nearly equalized during the entire season.

"It is the opinion of the court that the change that is here asked for can do no injury to any vested rights, but that the tendency would be to benefit vested rights, rather than to injure."

We may readily concede the correctness of the views expressed by the learned trial judge, that, as a whole, the vast territory irrigated or to be irrigated from the Rio Grande river may be benefited in general by the application of water during flood seasons to the largest possible

area of irrigated lands; that thereby the soil of the entire area becomes a vast reservoir from which the water has a tendency to return slowly to the stream at some point in its course, and thereby many more acres, as a whole, may be irrigated than if the water were permitted to run off; but the fact that many more acres and people may be served by this means of storage cannot avail as against the injury to protestants in this case, whose junior decreed rights are shown to be injuriously affected. There is absolutely no evidence in this case from which it can be inferred that the vested rights of the protestants will be benefited; and the fact, if it be a fact, that the vested rights of others may be benefited, is not material to the issues of this case; and, while it is true, as we have heretofore said, and as the court finds, that the lands formerly irrigated from the Centennial ditch will still be irrigated, there is nothing to show that the same quantity of water, or anything like it, is to be used thereon; and, as against the showing made by the protestants, the burden of proof was upon the petitioner to show that, notwithstanding the withdrawal of approximately forty cubic feet of water per second of time from the irrigation of those lands by the contemplated change, substantial injury would not inevitably result to the junior appropriators. Furthermore, the finding and judgment of the court seems to be in part the result of certain judicial notice or knowledge which the trial judge took of the records of his court, which were not in evidence nor in any manner accessible to this court upon review; but courts cannot go outside of the record and speculate as to the effects of what might be shown had evidence been adduced, but can only determine matters from the allegations and proofs submitted to them. The personal knowledge of the judge who tries the case cannot meet the requirements of the law that proof of necessary facts shall be made.—

Utah Nursery Co. v. Marsh, 46 Colo., 211, 103 Pac., 302; *People v. Hard Land Co.,* 51 Colo., 260, 117 Pac., 141.

This court hesitates in any case to substitute its conclusions for those of the trial court as to the effect which will be produced by certain admitted or proven facts, but as we view the case from the record, our duty is clear. In view of the conclusion we have reached, other matters raised by the assignments of error need not be decided.

The judgment will be reversed and the cause remanded, with directions to deny the petition.

Reversed and Remanded.

[No. 3724.]

McCREA v. FORD.

1. SALE—*Merchant's Stock in Bulk—Executory Contract—Effect Upon the Title.* Sale of a merchant's stock in bulk, to be consummated only after compliance with the statute (Rev. Stat., secs. 2678, 2679). Though possession is delivered, the title remains in the vendor.

2. —— *Purchaser Refusing to Proceed—Vendor's Rights.* Where the purchaser of a merchant's stock, in bulk, having made a deposit and received possession, refuses to complete the purchase and surrenders the goods, the seller, if he would insist upon his right, must hold all the goods ready for delivery upon payment of the residue of the stipulated price. If he resumes business and disposes of a substantial part of the stock he can neither enforce specific performance nor demand damages.

And the mere acceptance of possession waives the right to specific performance.

3. —— *Damages.* Where, in such case, the seller is entitled to damages he ordinarily recovers the difference between the contract price, and the market value at the time and place of delivery.

4. —— *Purchaser's Action for Deposit.* The purchase of a merchant's stock is rescinded by the purchaser for alleged frauds of the seller inducing the purchase. He surrenders possession, which the vendor accepts, resuming business and disposing of a substantial part of the stock. The purchaser recovers his deposit.

5. Pleadings—*Judgment Upon.* Where the complaint exhibits a cause of action and there is no counter-claim for the damages to which, alone, as appears by the answer, defendant is entitled, the plaintiff may have judgment upon the pleadings.

6. —— *Construed.* The answer as to a certain sum demanded in the complaint averred that defendant "has not sufficient knowledge upon which to base a belief and prays strict proof in respect thereto." Held sufficient to raise an issue.

7. Interest—*When Allowed.* Executory sale of a stock of merchandise and a deposit made by the purchaser. The latter alleging fraud upon the part of the seller abandoned the sale and sued for his deposit. He was allowed interest from the date of the sale.

8. Appeals—*Partial Error—Judgment.* The judgment being found excessive, the cause was remanded with directions to the court below to enter judgment for the sum found to be due, and award him a new trial as to the residue.

Appeal from Denver District Court. Hon. Greeley W. Whitford, Judge.

Mr. Hugh Butler, for appellant.

Mr. Charles C. Butler, for appellee.

Cunningham, Presiding Judge.

On April 20, 1910, appellant and appellee entered into an agreement whereby the former was to sell and the latter buy a stock of drugs which appellant owned in the city of Denver. By the terms of this agreement Ford, the appellee, was to pay for the drug stock the total sum of $9,400, $2,500 of this sum to be paid in cash, the balance upon the delivery of a bill of sale by appellant to appellee. The bill of sale was to be delivered after the requirements of the statute relating to the sale of goods in bulk had been complied with. The statute referred to in the agreement was presumably sections 2678-9 R. S. It required at least five days to comply with the conditions of this act. Appellee entered into possession of the stock of goods on April 20, 1910, at which time he paid appellant $2,500. Twenty-four hours thereafter, professing to

believe that appellant had made divers and sundry false and fraudulent representations concerning the stock of goods, whereby he, appellee, had been misled and swindled, he demanded that appellant take back the stock and repay to him the $2,500. Appellant alleges in his answer that he at first refused to consider this demand, but he admits he did take charge of the store and continued to run it in all respects as though no sale had been made or contemplated, buying new stock and selling at retail in the customary manner. On May 6, Ford, the appellee, hereinafter referred to as plaintiff, brought suit against McCrea, the appellant, hereinafter referred to as defendant, to recover the $2,500 which he had paid on the purchase price of the stock, and for $127.04, which plaintiff alleged he had placed and left in the cash drawer of the store from his own private funds. The complaint contains sufficient allegations to sustain a case of fraud and deceit, and, if true, justified the plaintiff in refusing to carry out the agreement, and the judgment as prayed for. Defendant denied the material averments touching the misrepresentations which he is alleged to have made, but admitted having taken charge of the stock of goods, and adding thereto by making such purchases as were necessary to properly maintain the business, and he admitted he had continued to run the store in the customary manner up to the time of filing his answer, July 16, 1910. But defendant averred that he took charge of the store and conducted it in the manner stated, wholly in the interest of appellee, and to prevent the loss which would have ensued had the business been interrupted by closing the store. Defendant offered, in his answer, to account to plaintiff for all sales made, and to turn over the stock upon payment of the balance due on the purchase price, and upon the further payment of a reasonable compensation for his, defendant's, services and reimbursement for the moneys by him paid out for new goods. Appellant

prayed that the suit be dismissed and for his costs. He asked for no other relief whatever.

When the case was called for trial plaintiff moved for judgment on the pleadings, his motion was granted, and judgment for the full amount prayed for rendered against defendant. From this judgment defendant brings the case here on appeal.

1. The contract of sale is clearly executory, since defendant had not transferred the title by giving bill of sale, as required by its terms, and the balance of the purchase price had not been paid at the time plaintiff sought to rescind the agreement. The title to the stock of goods still remained in the defendant, as that was the evident intention of the parties, disclosed by the contract, and, notwithstanding the fact that plaintiff had taken possession pending compliance with the statute hereinbefore mentioned, after which only the transfer of title was to be made and balance of purchase price paid.—1 Meachem on Sales, secs. 476, 477. Under these circumstances defendant's remedy, if the breach was wrong and therefore actionable, was in damages. The title of the goods remaining in the defendant, and he having retaken possession, he could not maintain an action for specific performance of the contract.—*Sour Lake Co. et al. v. Deutser F. Co.,* 39 Tex. Civ. App., 86, 94 S. W., 188; *Ridgley v. Mooney,* 16 Ind. App., 362, 45 N. E., 348; *Dill v. Munford,* 19 Ind. App., 609, 49 N. E., 861; *Murphy Co. v. Exchange Bank,* 76 Neb., 573, 107 N. W., 845; *American H. & L. Co. v. Chalkley,* 101 Va., 458, 44 S. E., 705.

The answer admits the receipt and retention of the $2,500 paid upon the purchase price of the store. As the contract, for reasons already pointed out, was executory, and the title to the goods had not passed from the vendor, he was in no position to retain this sum as purchase money; no purchase had been consummated. He could retain it, if at all, as and for damages, which damages

ordinarily would be measured by the difference between the market value of the property at the time and place of delivery, and the price fixed in the contract.—*Funke v. Allen,* 54 Neb., 407, 74 N. W., 832; *Ridgley v. Mooney, supra.* But in this action the defendant did not counter-claim for damages; he contented himself, as we have seen, with a prayer for a dismissal of the complaint with costs. Indeed, by his answer, defendant denied that the stock and fixtures covered by the agreement would not invoice $14,000, the sum he is charged in the complaint with having represented to plaintiff they were worth, but $4,600 more than the purchase price agreed upon. Hence, his damage, if his answer be true, could in no event have been more than nominal, as plaintiff, upon abandoning the contract, placed the defendant back in the identical position occupied by him prior to and at the time plaintiff took possession of the stock, which possession, as we have said, was held for but twenty-four hours. At least, plaintiff alleges that he placed the defendant in the same position that he was in before the contract was entered into, and this allegation is not denied in the answer.

Viewed from the standpoint most favorable to defendant, the record discloses that plaintiff has been guilty of breaching an executory contract, without in any manner occasioning defendant damages. Having admitted that he has $2,500 of plaintiff's money, and making no counter-claim against him for damages, nothing remained for the trial court to do but enter judgment against the defendant for that sum.

2. It is contended with much plausibility on behalf of appellee that notwithstanding defendant's allegations in his answer that he protested against the abandonment of the contract by plaintiff, and declined to consent to its rescission, nevertheless, by his action in retaking the goods and exercising acts of ownership over them, which he admits in his answer, he must be held to have con-

sented, and thereby waived at least his right to either sue upon the contract or bring an equitable action to enforce it. This position seems to find support in the following cases: *Ogburn-Dalchau Lmbr. Co. v. Taylor* (Tex. Civ. App.), 126 S. W., 48; *Brunswick Gro. Co. v. Lamar,* 116 Ga., 1-7, 42 S. E., 366; *Redmond v. Smock,* 28 Ind., 365.

In the last case, at page 370, the Indiana court uses this language:

"The taking possession of the goods and storeroom, and treating them as their own, and selling them in their own names by the appellees, after the abandonment by the appellants, was, under the authorities, a rescission of the contract."

In the Georgia case cited, page 7, 42 S. E., 368, appears the following:

"There is no authority or precedent in law for the course pursued by plaintiff, after the alleged violation by the defendants of their contract, in continuing to conduct the business for nearly a year, buying new goods, opening additional accounts (many of which were admitted to have been bad), and keeping traveling salesmen on the road for the purpose of selling the goods."

It appears to be defendant's theory that he is conducting the store as the agent of the plaintiff, and that he holds it ready to be turned over, under the contract, when the terms of the contract shall have been carried out, and when he shall have been paid for his services and disbursements as such agent. In other words, he apparently is proceeding upon the theory that he has performed his part of the contract of sale, and therefore may hold the property subject to the buyer's order, and recover the full agreed price, or perhaps that he may sell it for the buyers and then recover the difference between the proceeds of the sale and the agreed price; but his conduct, as admitted in his answer, will not admit of the application of either of these rules granting the antecedent facts

would warrant their application. In *Ogburn Co. v. Taylor, supra,* it is held that the seller's right to retain the property for the buyer and sue for the price, where the latter refuses to receive and pay for the goods sold, involves the continued recognition of the buyer's title to the goods, and, on a claim for damages for a breach of contract, the seller must hold all the property ready for delivery upon the buyer's demand, upon an offer of full payment, and is not entitled to pursue such remedy if he has placed any part of it beyond his control.

It will be seen from what we have already stated that under defendant's answer he admits having taken possession of the stock of goods, and from April 21st to July 16th, a period of eighty-five or eighty-six days, he continued to sell goods at retail, and to replenish the stock as it seemed to him the requirements of the business demanded. There is nothing in the pleadings to indicate just what these retail sales and these purchases by the defendant aggregated, but it is charged in the complaint that the defendant represented that the daily sales amounted to $80. Taking this for a basis, during the eighty-five or eighty-six days that he held the stock of goods before filing his answer, he would have disposed of almost $7,000 worth of goods, and if he kept the stock up, would have purchased many thousands of dollars' worth. At any rate, we may safely assume that a very substantial portion of the original stock of goods had been disposed of by the defendant after he took possession, on May 21st, and before he filed his answer, on July 16th, and the stock must have undergone a substantial change. No authority has been called to our attention, and we know of none, holding that under the circumstances here related, a vendor has the right to sue on the contract or to bring an equitable action for its enforcement. By repossessing himself of the goods, and in all respects treating them as his own, selling them in the customary course of business, as he admits in his an-

swer he did do, the defendant should be held to his action in damages for a breach of the contract, and this would be true even granting the title to the goods had, before the breach of the contract, vested in Ford, the vendee.

The defendant had every opportunity to set up a counter-claim for damages for the breach of the contract. For reasons satisfactory to himself (presumably because he believed the stock of goods to be worth as much or more than the sum which, under the agreement, he was to receive for it) he waived this, his only available remedy, and the judgment of the trial court must be affirmed as to the $2,500 item.

3. Whether the plaintiff was entitled to a judgment on the pleadings for the $127.04, which he alleges he left in the cash register, depends upon the sufficiency of defendant's answer, which reads as follows:

"The defendant, answering, says that as to that portion of the complaint which avers that the plaintiff, upon taking possession of said store on April 21, 1910, placed the sum of $127.04 in cash in the register of said store for the purpose of making change, he has not sufficient knowledge or information on which to base a belief, and therefore prays full and strict proof in respect thereto."

While the language of this denial may be subject to criticism, we think it is sufficient to raise an issue, and that it cannot fairly be said to constitute an admission that this sum of money was left in the cash drawer by Ford and retained by McCrea. Therefore, in the absence of all proof, the trial court ought not to have awarded plaintiff judgment for this sum, and its judgment must be accordingly modified.

The case is remanded, with directions to the trial court to enter judgment for the plaintiff and against the defendant for the sum of $2,500, with interest thereon from April 21st, 1910. As to the $127.04, the respective

parties will be permitted to amend their pleadings as they may be advised, or they may try the issue joined by the pleadings as now framed.

Remanded with Directions.

[No. 3693.]

NISBET v. CRISTLER.

1. LIMITATIONS—*Action to Quiet Title.* The provisions of section 4073 of the Revised Statutes have no application to a bill to quiet the title to lands.

2. JUDGMENT—*Record of Judgment Entry as Evidence.* The record of a decree assuming to quiet the title to lands is no evidence of title, unless accompanied by the judgment roll.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE and Mr. F. L. FERRIS, for appellant.

Mr. CHALKLEY A. WILSON and Mr. ASHER B. WILSON, for appellee.

HURLBUT, J., rendered the opinion of the court.

Action in the Washington district court to quiet title to land in Washington county, instituted December 30, 1908, by appellee as plaintiff, against appellant. Complaint is in usual form, to which defendant by his answer interposes three defenses, the first of which consists of admissions and denials. The second pleads title in defendant by virtue of a tax deed recorded February 8, 1901; also that no action for the recovery of the land sold had been brought within five years, etc. The third reiterates defendant's claim of title by virtue of the tax deed aforesaid, and further pleads the seven years statute of

limitations based upon claim and color of title made in good faith, and payment of all taxes for seven successive years, section 4089, Revised Statutes, 1908. Replications filed by plaintiff formed issues upon the new matter stated in the answer. Amended answer was filed, setting up further title in defendant by virtue of a decree of the county court of Washington county, to which replication was filed. The replication denied every allegation of the amended answer, and further alleged that the so-called decree of the county court was void for the reason that the return of the sheriff on the summons did not show personal service on defendants in that case, and failed to show that service could not be made upon them; that the affidavit therein was made on information and belief; that the same did not show the postoffice address of the defendants sought to be served by publication, nor any reason for omitting such statement. Judgment was rendered in favor of plaintiff, from which judgment this appeal is prosecuted.

The record is short, and the evidence fixes the fee simple title to the premises in plaintiff. The defendant in proof of his pleaded title offered in evidence the tax deed above mentioned, to which plaintiff objected upon the ground that the deed was void on its face, because it shows an assignment of the tax sale certificate by the county clerk more than three years after the sale. The objection was sustained. Defendant then offered in evidence the county court decree, which purported to fix title to the disputed premises in one Henry G. Hay, from whom defendant deraigned title. It was stipulated that whatever title the tax deed conveyed or the decree established was vested in defendant.

It is stated in appellant's brief that but two questions need be considered on this appeal, first, was the action barred by the statute of limitations; second, did the court err in sustaining the objection to the county court

decree? We will give no consideration to any assignments of error other than those relative to the questions just mentioned. As to the first, concerning the statute of limitations, appellant contends that the action is barred by reason of sec. 4073, Revised Statutes, 1908, which reads as follows:

"Bills of relief, in case of the existence of a trust not cognizant by the courts of common law, in all cases not herein provided for, shall be filed within five years after the cause thereof shall accrue and not thereafter."

This statute is usually spoken of by the profession as the "equity five years statute of limitations," and its construction and application have been before the supreme court, as well as this court, several times, and they have definitely decided that the statute is not applicable to cases of this kind.—*Morgan, Admr., et al. v. King,* 27 Colo., 539, 63 Pac., 416; *Ballard v. Golob et al.,* 34 Colo., 417, 83 Pac., 376; *Munson v. Marks,* 52 Colo., 553, 124 Pac., 187; *Terry v. Gibson,* 23 Colo. App., 273, 128 Pac., 1127; *Empire R. & C. Co. v. Irwin,* 23 Colo. App., 206, 28 Pac., 867; *Wells v. Brown,* 23 Colo. App., 190, 128 Pac., 869. From these decisions it will be seen that plaintiff's contention is untenable.

The second objection to the judgment, viz., that the trial court erred in excluding the county court decree from evidence, is equally untenable. Appellant's counsel has ably and at great length discussed this proposition, but unfortunately for him our supreme court, as well as this court, has determined that question adversely to the views contended for by him.—*McLaughlin v. Reichenbach,* 52 Colo., 437, 122 Pac., 47; *Terry v. Gibson, supra; Empire R. & C. Co. v. Coleman,* 23 Colo. App., 351, 129 Pac., 522. The record shows that defendant pleaded this county court decree as vesting in him, through *mesne* conveyances, absolute title to the premises in dispute; that he relied upon the same to establish his title and offered it

in evidence for that purpose. It was relied upon as an estoppel and as an adjudication relative to the title of the premises in dispute, and is claimed to be binding upon plaintiff. At the time he offered the decree defendant did not accompany it with the judgment roll, nor did he offer the judgment roll at any other time during the trial. This fact affirmatively shows that if, in excluding the decree from evidence, the court erred, it did not in any way prejudice defendant's rights, for if the decree had been received in evidence, unaccompanied by the judgment roll, it would not have established title in defendant or his grantors as against that of plaintiff. As suggested by Judge Cunningham in *Terry v. Gibson, supra,* the trial court might, and probably should, have admitted the decree when offered, for what it was worth, with leave to plaintiff to strike, if the same should not thereafter have been accompanied by the judgment roll. It should not be overlooked that the replication not only denied the existence of the decree, but pleaded that the same was void because of defects in the service of summons, and because the affidavit for publication was fatally defective in not reciting the postoffice address of defendants, or that the same was unknown.

Perceiving no reversible error in the record, the judgment is affirmed.

Judgment Affirmed.

[No. 3695.]

HOSMER ET AL. v. WILSON.

Judgment affirmed on the authority of *Nesbit v. Cristler, ante,* 314.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE and Mr. F. L. FERRIS, for appellants.

Mr. CHALKLEY A. WILSON and Mr. ASHER B. WILSON, for appellee.

Opinion *per curiam.*

This case involves substantially the same questions of law and fact as those presented in *Nisbet v. Cristler*, No. 3693, decided at this term of the court. Upon the authority of that case the judgment herein is affirmed.

Judgment Affirmed.

[No. 3696.]

DENNY ET AL. v. WILSON.

Judgment affirmed on the authority of *Nesbit v. Cristler, ante*, 314.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE and Mr. F. L. FERRIS, for appellants.

Mr. CHALKLEY A. WILSON and Mr. ASHER B. WILSON, for appellee.

Opinion *per curiam.*

The questions presented in this case are substantially the same as those presented in *Nisbet v. Cristler*, No. 3693, decided at this term of the court, and upon authority of the latter case the judgment herein is affirmed.

Judgment Affirmed.

[No. 3729.]

BERRY v. FRENCH ET AL.

1. PLEADING—*Demurrer.* A demurrer alleging ambiguity, uncertainty, etc., and not in any way attempting to show wherein the alleged defect consists will be disregarded (Rev. Code, sec. 57).

2. —— *Laches.* That the claims asserted by a complaint may appear stale, and the plaintiff's conduct extraordinary, ought not, ordinarily, to be determined upon general demurrer.

3. DISTRICT COURT—*Jurisdiction.* A bill against the heirs, devisees and executor of a decedent, to establish a trust in lands purchased by such decedent with moneys of the plaintiff in decedent's hands, as plaintiff's trustee, lies in the district court. The provisions of sec. 7206 of the Revised Statutes are without effect to exclude the jurisdiction.

4. STATUTE OF FRAUDS—*Pleading.* A bill to establish a trust in lands need not show that the contract or promise upon which plaintiff relies is evidenced by any writing. As against a general demurrer it will be assumed, nothing to the contrary appearing in the complaint, that plaintiff will prove a writing.

And, though the complaint sets up a particular writing, it will not be assumed that this will be the only evidence to support the action.

5. —— *A Resulting Trust in Lands*, may be established by oral testimony.

Appeal from Weld District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. JOSEPH C. EWING and Mr. WILLIAM R. KELLY, for appellant.

Mr. H. E. CHURCHILL and Mr. JAMES C. SCOTT, for appellees.

CUNNINGHAM, Presiding Judge.

Appellant Berry, as plaintiff below, filed her bill in the district court on May 14, 1910, for the purpose of having herself adjudged to be the owner of lots one and two in block twenty-five in the city of Greeley, and for an accounting for the rents, income and profits from said lots, which she alleged had come, under circumstances which

we shall presently state, into the hands of D. L. and Hannah J. Dawley, husband and wife, both of whom had died prior to the bringing of the action. The defendants in this case, with the exception of Tuckerman, were the heirs and legatees of Hannah J. Dawley, Tuckerman being the executor of the said Hannah's will. Appellant, hereinafter referred to as plaintiff, alleged that she was the niece of D. L. and Hannah J. Dawley; that D. L. Dawley died in 1881, making his wife, Hannah J. Dawley, his sole beneficiary, with the exception of a conditional legacy which lapsed; that prior to the death of D. L. Dawley there was money in his hands belonging to plaintiff to the amount of $1,244; that none of this money had ever been repaid to plaintiff except $75; that plaintiff was induced to leave said money in the hands of the said Dawleys upon their advice, and relying upon their assurances that they would invest the same in trust for her; that on May 27, 1879, the said Dawleys purchased the said lots one and two, for a consideration of $441, taking the deed in the name of D. L. Dawley; that thereafter the said D. L. and Hannah J. Dawley held and possessed said lots in trust for plaintiff; that the purchase price of said lots was paid by the Dawleys from money belonging to the plaintiff, and then in the possession of the said Dawleys as trustees for the plaintiff, and that the said purchase was made as an investment for plaintiff; that Hannah J., as successor in trust of D. L. Dawley, after the latter's death, continued to the date of her own death in possession of said lots as trustee for plaintiff.

Plaintiff further alleges that there came into the hands of the said Dawleys as the net income of said property an aggregate of $7,000; that the said property is now held by Tuckerman, as successor in trust, for plaintiff. There are other averments in the complaints which we think are in the nature of evidentiary matter, which it is

not necessary for us to set forth in order that the contentions of the parties may be clearly understood.

1. To the amended complaint containing these averments, among others, the defendants filed a demurrer, which was in the following language:

"1. That the said amended complaint does not state facts sufficient to constitute a cause of action.

"2. That said complaint is ambiguous, unintelligible, and uncertain."

This is the only pleading which the record discloses that defendants filed. But defendants' attorneys say in their brief (though the record does not so indicate) that on the trial they interposed a demurrer *ore tenus* to the jurisdiction of the court, and that the trial court sustained the demurrer, on all grounds. Plaintiff, electing to stand on her complaint, judgment of dismissal was entered against her, from which judgment she appeals. The general demurrer is all that we can consider. The second ground of the demurrer, being special in its form, offends against the provisions of code section 57, Revised Statutes, reading as follows:

"The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken; unless it do so, it may be disregarded."

No attempt being made by the defendants in the second ground of their demurrer (which we have set out *in haec verba*) to point out wherein the complaint is ambiguous and unintelligible, we cannot consider that objection.—*Irvine v. Wood,* 7 Colo., 477, 4 Pac., 783; *Camfield v. Jeannotte,* 31 Colo., 292, 72 Pac., 1062; *Baden Baden G. M. Co. v. Jose,* 20 Colo. App., 261, 78 Pac., 313.

The first and sixth grounds of demurrer, as classified by our code, are sufficiently stated in the language of the statute. All other grounds will be disregarded, unless, in addition to the statutory language, the reasons or specific

grounds therefor be stated.—*Mitchell et al. v. Pearson,* 34 Colo., 278, 82 Pac., 446; *Henderson v. Johns,* 13 Colo., 280, 22 Pac., 461.

2. The demurrer of the defendants, interposed during the course of the trial, to the jurisdiction of the court (if one was so interposed) ought to have been overruled on the authority of *Marshall v. Fleming,* 11 Colo. App., 515, 53 Pac., 620; *Currier v. Johnson,* 19 Colo. App., 94, 73 Pac., 882; *Carl v. Northcutt,* 48 Colo., 48, 108 Pac., 944; 22 Enc. Pl. & Pr., 23; 39 Cyc., 593.

The contention of counsel for appellees, defendants below, upon the question of jurisdiction, is based upon section 7206, Revised Statutes, and they insist that the complaint alleges a debt or demand against the estate, hence the probate court has exclusive jurisdiction. They cite in support of this contention cases from various states. But whatever may be the rule in other states, it is clear from the authorities already cited that both courts of review in this state have decided the question of jurisdiction here involved contrary to appellees' contention, hence it will not be necessary to refer at length to their citations from other states, some of which do not appear to be in point.

3. It will be seen from what has already been stated that the sole question for our determination is whether the complaint in this cause states facts sufficient to constitute a cause of action. Appellant set forth in her complaint a certain writing made by Hannah J. Dawley, on November 28, 1905, some four years before her death, in which writing the said Hannah, in narrative form, states that her husband had money belonging to plaintiff; that she, Hannah, had destroyed this paper and writing, and lied to plaintiff when she inquired about it, and expresses contrition for her act. Throughout the defendants' brief they make a spirited assault upon the sufficiency of this writing to establish a trust. In the view we take of the

matter, this writing was nothing more or less than evidence, with the weight or admissibility of which we are not now concerned. If the plaintiff has properly alleged the trust, it may not be assumed that because she pleaded a certain written instrument, that will be the only evidence offered to support her allegations. As we read the complaint, it is sufficient without pleading this writing, unless perhaps the writing was necessary to take the case out of the statute of frauds. But, as against a general demurrer, it is not necessary that the complaint should allege that the contract was based on a writing in order to take it out of the statute of frauds, for it will be assumed, in the absence of anything appearing in the complaint to the contrary, that the complaint was based upon a writing. Furthermore, if the complaint sought to set up a resulting trust, it is not necessary that the same should be based upon a written instrument, since it may be proven by oral testimony entirely. Resulting trusts and constructive trusts have been discussed learnedly in the briefs, but a difference in terminology does not settle principles, and courts need concern themselves but little with the nice distinctions between the various classifications of trusts. This view is stated very aptly in *Kaphan v. Toney* (Tenn.), 58 S. W., 909-913, and in 39 Cyc., 26.

If the plaintiff's bill is sufficient to permit her to prove a resulting trust, the demurrer ought not to have been sustained, no matter what her counsel in their brief may insist as to the class of trust they had in mind when they drew the bill, or what their views may be as to the classifications in which the particular trust which they are seeking to establish, and which they have alleged, may properly fall.

4. The plaintiff's claim may seem stale, and her conduct extraordinary, but these are matters that ordinarily ought not to be irrevocably determined upon general de-

murrer, which admits all of the allegations of the complaint that are well pleaded.

We think the averments of the complaint are sufficient to require an answer at the hands of defendants, and the judgment of the district court will be reversed and the cause remanded for further proceedings.

Reversed and Remanded.

[No. 3731.]

BRACKETT v. MCCLURE ET AL.

1. TAX TITLES—*Void Deed.* A tax deed fair upon its face may be invalidated by evidence *aliunde*, e. g., that the land was assessed as a quarter section, and was sold in separate forty-acre tracts; or that no proper affidavit of the posting of the notice of sale, as required by statute (Rev. Stat., sec. 5708), was filed.

2. JUDGMENT—*Who Concluded.* A decree quieting title to lands is without effect as to those who were not parties to the cause, nor claiming under those named as defendants therein.

3. QUIETING TITLE—*Unknown Persons.* It seems that unknown persons may, under the code (sec. 50), be made parties to a suit to quiet the title to lands, and may be concluded by the decree therein.

4. —— *Disclaimer of Sole Defendant*, charges the plaintiff with notice of the absence of the necessary parties, and puts him upon inquiry.

5. CONVEYANCE—*Construed.* Certain lands situate in Logan county were in question. They were granted to the Union Pacific *Railway* Company by letters patent Feb. 26th, A. D. 1897. The action being an equitable one to remove a cloud upon the title, the defendant relied upon a decree against the Union Pacific *Railway* Company quieting title thereto; and, to show title in that company, he produced a deed executed to the Union Pacific *Railroad* Company by a master in chancery under the foreclosure of a sinking fund mortgage, describing the lands conveyed as "all the lands in parcel two, as in said decree defined situate, etc., and not heretofore sold and conveyed by the Union Pacific *Railroad* Company * * * and not released by the trustee of said sinking fund mortgage." What lands were included in "parcel two" was not shown, and it appeared that, in fact, years prior to the master's deed, the Union Pacific *Railway* Company had conveyed the

land in question to the ancestor of plaintiff, and the trustee of the mortgage had united therein, releasing the mortgage. *Held* that the master's deed, by its express terms, excluded the lands in controversy.

6. —— *Not of Record—Bona Fide Purchaser.* One claiming lands under a tax title, and a decree quieting the title against a former owner who had previously conveyed the lands by deed not of record, is not a bona fide purchaser within Revised Statutes, sec. 694.

Appeal from Logan District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Messrs. MUNSON & MUNSON, for appellees.

KING, J., delivered the opinion of the court.

The judgment under consideration on the appeal herein was rendered by the district court in and for the county of Logan in favor of plaintiffs on their complaint in the nature of bill in equity to remove cloud from, and quiet title to, a quarter-section of land in that county, of which the plaintiffs claimed to be the owners in fee simple. The defendant relied upon a treasurer's tax deed and a decree of the county court of said county whereby the title of appellant's grantor purported to be quieted as against the Union Pacific Railroad Company in a suit instituted and culminating in said decree after the deed under which plaintiffs' claim was executed and delivered, but before it was recorded. Plaintiffs claim by descent from and as heirs of James C. McClure, deceased. Neither the said James C. McClure nor any of the plaintiffs herein was a party to said suit to quiet title. The Union Pacific Railroad Company was the only party defendant thereto.

The tax deed was admitted to be fair on its face, but was properly held to be void for reasons *aliunde,* to-wit, because the quarter-section had been assessed as an entirety, but was offered and sold in separate forty-acre

tracts, and for the reason that no proper affidavit of posting of the list and notice by the county treasurer was made and filed as required by law.

The plaintiffs herein were not bound nor affected by the decree pleaded, because they were not parties, nor was their ancestor, through whom they claimed, a party to that suit; nor does it appear that any attempt was made to secure jurisdiction and foreclose the rights of persons whose names or interests were unknown to the plaintiffs as provided for in section 50, Civ. Code, R. S., 1908, section 44, Mills' Ann. Code; nor was it made to appear in this proceeding that the Union Pacific Railroad Company had any interest in the land at the time of the institution of said suit, or subsequent thereto. The government patent for said lands was issued to the Union Pacific *Railway* Company under date of February 26, 1897, and recorded March 27th of the same year. A deed from the Union Pacific Railway Company to James C. McClure, plaintiffs' ancestor, dated June 12, 1894, recorded June 18, 1909, about the time of the commencement of this suit, was in evidence. Appellant contends that the Union Pacific Railroad Company acquired title to said lands by virtue of a sale under foreclosure of a sinking fund mortgage deed executed by the Union Pacific Railroad Company, dated December 18, 1873, and recorded prior to the execution of plaintiffs' deed from said railway company, and which was foreclosed after the execution and delivery of plaintiffs' deed, and before its record, at which sale the Union Pacific Railroad Company was a purchaser, and its deed pursuant to such sale was recorded *May 9, 1899;* that said Union Pacific Railroad Company was, at the time of the institution of the suit to quiet title, the only record owner of said premises, and that neither the appellant herein nor any of his grantors had knowledge of the rights or claims of the plaintiffs herein or their ancestor. Appellant's contention that the

Union Pacific Railroad Company was the record owner of, or had any interest in, the land at the time of suit to quiet title is not sustained by the record. The deed from the master in chancery by which certain real estate was conveyed to the railroad company does not convey the land in dispute in terms of particular description, nor in general terms from which it can be determined, or even inferred, that an attempt was made to convey it. The general description of the land conveyed by the deed is "all and singular the lands, land rights and other property embraced in Parcel Two, as in said decree defined, situated in the County of Logan, State of Colorado, *and not heretofore sold and conveyed* to purchasers thereof by The Union Pacific Railroad Company or its successor The Union Pacific Railway Company, and not released by the Trustee of said Sinking Fund Mortgage from the lien thereof." There is no evidence as to what lands were "embraced in Parcel Two." The deed from the railway company to James C. McClure conveyed the land in dispute, and, being joined in by the trustee of the sinking fund mortgage, released the land from the mortgage lien, so that the master's deed, *ex vi termini,* excluded the lands in question, and the appellant herein and his grantors were charged with notice of such exclusion by the terms of the very deed under which they claim protection. They were further charged with notice by the disclaimer of the Union Pacific Railroad Company entered in the suit to quiet title, and if they had made such inquiry of the railroad company or the railway company as the nature of such notice would suggest, they might have discovered not only the fact of the sale and conveyance by the railway company to McClure, but also his place of residence, or, failing to acquire such information, the exercise of due prudence would require compliance with those provisions of the code by which jurisdiction could have been obtained of the person or persons whose names

or place of residence and postoffice address were unknown.

It will not be amiss to call attention to the fact that appellant was permitted to amend his second defense so as to show that the Union Pacific Railroad Company, purchaser of the unsold property at the master's sale, was the Union Pacific Railroad Company, *a Utah corporation,* as distinguished from the Union Pacific Railroad Company (the mortgagor), *incorporated under an act of congress.* It is wholly immaterial as to the merits of the case. No such distinction is made in the decree to quiet title, relied on by defendant. This serves to explain an apparent anomaly, as, without such explanation, it would seem that the mortgagor in the sinking fund mortgage became the purchaser at the foreclosure sale.

The appellant and his grantors, claimants under the tax title and under the decree to quiet title, were not *bona fide* purchasers or encumbrancers of said land within the contemplation and protection of the recording act, namely, section 694, R. S. 1908. This phase of the case is so fully and ably presented by Judge Morgan in *Carroll et al. v. Kit Carson Land Co.,* 24 Colo. App., 217, 133 Pac., 148, as to require no further notice here.

The judgment of the lower court will be affirmed.

Affirmed.

[No. 3754.]

HALE v. COCHRANE.

CONTRACT—*Rescission.* Purchaser of live stock assumes possession and ships the animals to market in another state, consigned to brokers of his own selection. The animals being offered at this market, one having no apparent authority in the premises raises a false question as to the title, not disturbing the possession, and the brokers sell them in the

open market. An attempted rescission of the sale by the purchaser for the pretended defect in the title is without effect. He is liable to the seller for the contract price.

Appeal from Larimer District Court. HON. JOHN W. SHEAFOR, Judge.

MESSRS. RHODES & TEMPLE and MESSRS. RHODES & FARNSWORTH, for appellant.

MESSRS. ALLEN & WEBSTER, for appellee.

CUNNINGHAM, Presiding Judge.

Appellee Cochrane, a stockman living near Wheatland, in Wyoming, sold a bunch of cattle to the appellant Hale, who was a stockbuyer. Hale gave in payment for the cattle so bought a draft on a Denver commission firm. At the time of the purchase of the cattle Hale made no representations to Cochrane as to the purpose for which he was buying the cattle, or where he intended to ship them, but he afterwards did ship them to the Denver stock yards. At this point a brand inspector raised some question about the title to a part of the animals. Thereupon, Hale wired Cochrane that he, Hale, had stopped payment on the draft, and that the cattle were subject to Cochrane's order.

The evidence discloses beyond question (a) that the title to all the cattle, save one steer, was in Cochrane when he sold them to Hale, and as to this steer Cochrane has never at any time made any claim, and its value is not included in the amount for which he sues; (b) that Hale consigned the cattle to a firm of commission merchants in Denver, who sold them on the open market; (c) that Cochrane had nothing whatever to do with the sale of the cattle, exercised no authority over them after Hale had taken possession of them, and gave no direction whatever concerning their disposition; (d) that the cattle were not taken in charge by the brand inspector,

nor did he, the inspector, in any manner interfere with their sale, further than to request the commission merchants to hold up the proceeds from the sale of a few head of the cattle about the title to which, owing to certain brands, there was in the mind of the inspector some doubt; (e) that Cochrane came to Denver with a bill of sale showing his title to all the cattle save one, whereupon Hale's brokers, who had sold the cattle as above related, urged Cochrane to accept the proceeds from the sale of the cattle then in their hands, which (save as to the one steer to which Cochrane made no claim) he did; (f) that the sum of money turned over to Cochrane by Hale's brokers was something over $700 short of the amount which Hale owed Cochrane (payment on the draft having been stopped).

On the trial of the case, which Cochrane brought for the balance due him on the purchase price of the cattle, the judge directed a verdict in Cochrane's favor.

Appellant's defense seems to be predicated upon the contention that he had a right, under the circumstances above related, to rescind the contract, and that his telegram to Cochrane amounted to a rescission. How Hale can claim the right to buy cattle, ship them to a foreign state, consigned to commission merchants or brokers of his own choosing, and then, when someone, without any apparent authority so to do, merely questions his title, rescind the contract of sale, leaving the cattle in charge of his, Hale's agents, in a city distant from the point of purchase, is not clear. But granting that under certain conditions he might have this right, when his brokers sell the aforesaid animals without any authority of any sort from the original owner who sold them to Hale, but presumably as the agent of Hale himself, the doctrine of rescission would appear impossible of application.

The record discloses that after Hale had purchased the cattle, and before they could be disposed of on the

Denver markets, there had been a slump in prices. It is this fact, we are constrained to believe, rather than the action of the brand inspector complained of, which moved appellant to stop payment on the draft.

On the whole record, the trial court was warranted in instructing the verdict for the plaintiff, and the judgment is affirmed.

Judgment Affirmed.

[No. 3803.]

WEISS ET AL. v. AHRENS.

1. ATTACHMENT—*Levy on Lands.* Under sec. 115 of the code, a writ of attachment is not effectually levied upon lands unless a copy of the writ, with a description of the lands taken, is filed with the recorder in the county. The mere filing of a certificate of the levy is without effect as to subsequent purchasers.

2. APPEALS—*Finding Upon Conflicting Evidence*, sufficient in law, concludes the court of review.

3. TRIAL BY JURY—*Equity Causes.* All issues joined in an equity cause are tried by the court. The presiding judge may, in his discretion, submit questions of fact to a jury, but their verdict is merely advisory, and the presiding justice may reject it if not approved by his conscience.

4. JUDGMENT—*Collateral Attack.* An insufficient and void levy of an attachment upon lands is made and the plaintiff in the action recovers judgment. One not a party to that action institutes a suit in equity to set aside, as a cloud upon his title, such void and insufficient levy. The latter action is not an attack upon the judgment in the former.

Appeal from Rio Grande District Court. HON. CHARLES C. HOLBROOK, Judge.

Messrs. CORLETT & CORLETT, for appellants.

MR. JESSE STEPHENSON, for appellee.

BELL, J.

Rudolph Ahrens, appellee, filed his complaint in equity in the district court of Rio Grande county against

August J. Weiss, as sheriff of said county, and The Farmers and Merchants State Bank of Attica, Indiana, appellants, for the purpose of having cancelled and held for naught two so-called certificates of levy filed by said sheriff, under a certain writ of attachment, in the office of the clerk and recorder of said county on the 9th day of February, 1910, against the interests of J. W. Ahrens and C. Lewis Ahrens in Lots 20, 21, 22 and 23 of Block 22, in the West Side Addition of the town of Monte Vista, in said county, and likewise to cancel and hold for naught a certificate of purchase of said property, bearing date January 21st, 1911, issued by said sheriff to The Farmers and Merchants State Bank aforesaid for the sum of $606.25; and prayed that all of said instruments be cancelled upon the records of said county and held for naught and the cloud thereby created upon his title to said property be removed, and that said sheriff be enjoined from making a deed to said property by reason of said certificates or any of them; and the relief as prayed for in said complaint was granted by the court.

On the 9th day of February, 1910, said Farmers and Merchants State Bank filed an affidavit of attachment in said court in an action which it had instituted against J. W. Ahrens, W. A. Robb and C. Lewis Ahrens, and caused a writ of attachment to be issued thereon directing the sheriff to attach any property belonging to said defendants, or any of them, so as to secure whatever judgment might be obtained against them, and, in pursuance of said writ, said sheriff, on the same day, filed two certificates of levy upon the property above mentioned in manner and form as provided and usually practiced in levying upon real estate under execution, but wholly neglected to file a copy of the writ of attachment, together with a description of the property attached, with the recorder of said county, except such description as was contained in said certificates of levy. None of the

defendants in the attachment suit was served with said writ of attachment, or personally served with the summons, although they appeared to the action and suffered judgment against them.

On the 10th day of February, 1910, one day after the certificates of levy had been filed, John W. Ahrens, C. Lewis Ahrens and Mayme Ahrens executed and delivered to Rudolph Ahrens, appellee herein, for an expressed consideration of $1,000, a good and sufficient deed for their interests in Lots 20 and 21 above mentioned, and on the same day C. Lewis Ahrens and Mayme Ahrens executed and delivered to the same grantee, for an expressed consideration of $400, a good and sufficient deed for their interests in Lots 22 and 23 above mentioned, and said deeds were duly filed for record in the office of the clerk and recorder of said county on April 30th and April 10th, 1910, respectively.

The sheriff, on the 17th day of March, 1911, something like eleven months after these deeds were filed for record, filed in the office of the clerk and recorder as aforesaid a copy of the writ of attachment, in a seeming endeavor to make his levy comply with the provisions of section 115 of the Civil Code, page 95 of the Revised Statutes of 1908, which reads as follows:

"Sec. 19. The sheriff to whom the writ is directed and delivered shall execute the same without delay, * * * as follows:

"First.—Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

"Second.—Real property, or any interest therein, belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person (but belonging to the defendant), shall be attached by leaving with such person or his agent a

copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county."

The sheriff, it will be noticed, entirely ignored that provision of the section of the code above recited which specifically directs that an attachment shall be levied by filing a copy of the writ, together with a description of the property attached, with the recorder of the county. If this provision is mandatory, then it would seem that the mere filing of a certificate of levy, without a copy of the writ of attachment, is not effective as against a subsequent purchaser.

In *Graham v. Reno,* 5 Colo. App., 330-334, 38 Pac., 835, this court, in considering the question of a failure of the sheriff to serve a copy of the writ of attachment and notice on the party in whose name the property stood of record, as required by division second of the section of the code above recited, said:

"It is thus distinctly provided by the act that the sheriff must not only serve the notice and the writ upon the person in whose name the title stands and file his writ with the clerk and recorder of the county, but he must likewise file a copy of the notice with the recorder when he files there the copy of his writ. A failure to pursue the statutory requirements is almost universally held fatal to a levy.—Wade on Attachment, sec. 126; *Maskell v. Barker,* 99 Cal., 642, 34 Pac., 340; *Robertson v. Hoge,* 83 Va., 124, 1 S. E., 667; *Main et al. v. Tappener et al.,* 43 Cal., 206; *Sharp v. Baird et al.,* 43 Cal., 577; *Arms v. Burt,* 1 Vt., 100 (301); *Repine v. McPherson,* 2 Kan., 340.

"These authorities very clearly sustain the position that there must be a strict compliance with the statutory provision to make a levy valid and a lien upon real property."

Our supreme court, in speaking to the same question, says:

"The remedy by attachment is purely statutory. It has no existence without the statute. It has an individuality entirely foreign to the common law, and, being in derogation of common right, must be strictly construed. An attachment of real estate and notice thereof is made by filing a copy of the writ, together with a description of the property, with the recorder of the county and by serving a copy of the writ on the defendant."

Great West Co. v. Woodmas of Alston Co., 12 Colo., 46-55, 20 Pac., 771, *Ibid.*, 108.

At a later period our supreme court, in considering the validity of the levy of an attachment on real estate, said:

"Full service was held to mean (in the former case) service upon the defendant personally, if a resident, and filing with the county recorder a *copy of the writ*, together with a description of the property sought to be attached."—*Thompson v. White*, 25 Colo., 226-231, 54 Pac., 718.

"The statute is mandatory, and, in order to create a valid lien on real property, its provisions must be strictly observed." (Quoted from dissenting opinion of Justice Beck.)—*Raynolds v. Ray et al.*, 12 Colo., 108-119, 20 Pac., 4.

In the case before us the appellants did not show even a *substantial* compliance with the provisions of the code above recited in the sheriff's endeavor to make a valid lien or levy on the property in question.

It is said in 4 Cyc., at page 618:

"A statutory provision for the recording of a copy of the writ and descriptive part of the return, in the attachment of realty * * * , is imperative, and observance thereof is necessary for the preservation of the lien against subsequent purchasers."

It would seem under the authorities that there was no existing lien on the lots in controversy by virtue of said attachment proceedings as against the rights of the appellee, at least, at the time the deeds to him were filed for record.

Counsel for appellants contend that the deeds to the appellee, filed for record prior to the completion of the levy under the writ of attachment by the sheriff on the property conveyed, were without consideration, fraudulent and void. The trial court heard the parties *pro* and *con* on this question, and upon sufficient evidence held said deeds to be valid, and we are bound by its findings on this point.

The appellants also insist that the court erred in denying their request for a jury trial. This action is purely equitable in its nature, instituted solely for equitable relief against the ministerial acts of the sheriff herein stated which clouds the legal title of the appellee to the property above mentioned. It is a well-established principle that when a court of chancery secures jurisdiction for the purpose of granting necessary equitable relief, it will try all questions, whether legal or equitable, when it is not deprived therefrom by statute, unless the court itself should elect to submit the questions of fact involved to a jury for the enlightenment of the chancellor's conscience. However, the chancellor is under no legal obligation to abide by the verdict of the jury under such circumstances if his conscience does not approve of the same.—*Abbott v. Monti*, 3 Colo., 561-563; *Hall v. Linn*, 8 Colo., 264-267, 5 Pac., 641; *Tabor v. Sullivan*, 12 Colo., 136-141, 20 Pac., 437; *Londoner v. People*, 15 Colo., 141-143, 26 Pac., 135; *Saint v. Guerrerio*, 17 Colo., 448-456, 30 Pac., 335; *Peck v. Farnham*, 24 Colo., 141-143, 49 Pac., 364; *Nelson v. First National Bank*, 8 Colo. App., 531-534, 46 Pac., 879; *Sieber v. Frink*, 7 Colo., 148-150, 2 Pac., 901.

The appellants further contend that the proceedings

here are a collateral attack upon the judgment of the court in the case of *The Farmers and Merchants State Bank of Attica, Indiana, v. John W. Ahrens, W. A. Robb and C. Lewis Ahrens* in the district court of Rio Grande county.

We do not so understand the proceedings. This is a new suit, a direct action in equity, instituted by Rudolph Ahrens against August J. Weiss as sheriff and said Farmers and Merchants State Bank for the purpose of having said ministerial acts of said Weiss as sheriff cancelled and held for naught so as to remove the cloud on the legal title of the appellee to the premises in controversy. Neither Rudolph Ahrens, appellee, nor the appellant Weiss was a party to the former action. Neither does this proceeding attempt to disturb the judgment against the defendants in the former action. The issues herein were regularly formed and tried in the court below for the purposes aforesaid, and we find no reversible error in the record, and therefore the judgment is hereby affirmed, with costs.

Affirmed.

[No. 3713.]

POAGE v. E. H. ROLLINS & SON ET AL.

1. TAX TITLES—*Void Deed.* A tax deed, based upon a sale to the county, is void upon its face if it fails to show that the land was offered on the day immediately preceding the day of the sale, and this, even though it literally pursues the form prescribed by the statute.

A tax deed recited an offer of the lands on the 15th day of December; that no bid was offered therefor, and that "having passed such property for the time" the treasurer "did re-offer it at the beginning of the sale next day, and until he became satisfied that no more sales * * * could be effected * * * thereupon said treasurer bid off in the name of said county all the lands." *Held* void upon its face for failing to show an offer of the land on any day other than that on which they were sold.

A deed showing a sale to the county and an assignment of the certificate of purchase by the county, "by its proper officers," but not showing by name or official title what officer made the assignment, is void upon its face.

2. —— *Evidence—Aliunde the Deed*, to show the regularity of all proceedings antecedent to the sale, is not admissible to contradict the positive recitals of a deed void upon its face.

3. LIMITATIONS—*Seven Years' Actual Residence*. To sustain a defense under Rev. Stat., sec. 4087, the defendant must be in possession, must have been an actual resident upon the land for seven successive years before the institution of the action, and must have had, during all that time, a connected title deducible of record.

4. —— *The Five Years' Statute*. Section 3904 of Mills' Statutes (Rev. Stat., sec. 5733) is not available in an action to quiet title.

5. PLEADINGS—*Amendment*. To reject an amendment which assumes to set up facts, the evidence of which is inadmissible, or a defense contradicted by the record and impossible of establishment, involves no error.

Appeal from Rio Grande District Court. HON. CHARLES C. HOLBROOK, Judge.

Mr. IRA J. BLOOMFIELD, Mr. JESSE C. WILEY, for appellant.

Mr. JOHN F. MAIL, for appellee.

HURLBUT, J., rendered the opinion of the court.

Action to quiet title, begun January 30, 1909, in the county court of Rio Grande County, culminating in a judgment in favor of plaintiff (appellant), from which an appeal was taken to the district court. Upon trial there had, defendants (appellees) secured a judgment quieting title to the premises in them. From this last judgment appellant has taken this appeal.

The usual denials and admissions are found in the answer, which further states that defendants claim fee title in the disputed ground by mesne conveyances from the government of the United States. In plaintiff's second amended replication to the answer his title is averred

to be founded upon a treasurer's tax deed recorded July 22, 1902. By stipulation the title to the premises was admitted to be in the corporation, E. H. Rollins & Sons, at the time suit was brought, unless divested or extinguished by the tax deed mentioned. This tax deed was offered in evidence and objected to as incompetent and void on its face, for various reasons given, the first being that the deed showed the property was struck off to Rio Grande County on the 15th day of December, 1898, etc. We think an examination of the deed will show that the objection was well taken. The recitals in the deed concerning the sale of the premises by the treasurer at the tax sale are in part as follows:

"And whereas the treasurer of the said county did on the 15th day of December, A. D. 1898, by virtue of the authority vested in him by law, at the adjourned tax sale begun and publicly held on the 12th day of December, A. D. 1898, expose to public sale at the office of the county treasurer in the county aforesaid in substantial conformity with the requirements of the statute in such case made and provided, the real property above described * * * and whereas no bid was made or offered by any person at said sale for any of the lands * * * and said treasurer having passed such property over for the time, did reoffer it at the beginning of the sale next day and until he became satisfied that no more sales of any property, and particularly of the property within specifically described, so offered could be effected at such sale, thereupon said treasurer did bid off at said sale for and in the name of said county of Rio Grande all the lands * * * and whereas the said county of Rio Grande by its proper officers, did, on the 18th day of July, A. D. 1902, duly assign the certificate of the sale * * * and whereas the said John George Bauer has paid subsequent taxes on said property to the amount of twelve dollars and eighty-three cents * * *, etc."

It has been held in *Bryant v. Miller,* 48 Colo., 192, 109 Pac., 959, that where property has been bid in for the county at a tax sale, the tax deed subsequently issued in pursuance thereof is void on its face if it fails to show that the land was offered on the day immediately preceding that on which it was sold to the county, and this is true even though the deed literally follows the form prescribed by the statute. To the same effect: *Empire R. & C. Co. v. Howell,* 22 Colo. App., 584, 126 Pac., 1096; *Empire R. & C. Co. v. Saul,* 22 Colo. App., 605, 127 Pac., 123. If we test the tax deed in question by the authorities cited, the deed was void on its face, and the court did not err in excluding it from evidence. There is nothing therein to show that the treasurer offered the property any other time than on December 15th. It certainly does not show that it was offered for sale on the 14th, nor can anything be found in the recitals justifying such inference. Failing to show this, the treasurer purchased the same for the county in violation of the statute.—*Emerson v. Valdez.,* Colo. App., decided September 15th, 1913, *ante* 458. The phrase in the deed, "said treasurer having passed such property over for the time did reoffer it at the beginning of the sale next day," etc., is ambiguous and unintelligible, when considered in connection with its other recitals. If the treasurer passed the property over for the time, what time is referred to, and when was it so passed, on December 15th, before, or after? If it was offered before the 15th and passed over, the time of such offer should appear in the deed. If he first offered it December 15th and then reoffered it the next day, that would be December 16th. This could not be the case, as the deed shows he offered and sold it on December 15th. If he offered it on December 14th, passed it over, and reoffered it the next day, then the deed should have recited that fact. If the recital had been to this effect the deed would have been good as against the objection urged.

The tax deed in question is void upon its face for another reason, as decided in *Foster v. Clark et al.,* 21 Colo. App., 192, 121 Pac., 130; *Empire R. & C. Co. v. Smith,* 23 Colo. App., 53, 127 Pac., 449, and *Emerson v. Valdez, supra.* It will be noticed in the excerpt from the tax deed that the recital, "and whereas the said county of Rio Grande by its proper officers did on the 18th day of July, A. D. 1902, duly assign the certificate," does not state what officer made the assignment. Section 177, page 132, Session Laws 1902, authorizes a certain designated county officer to make an assignment of a certificate of sale of lands sold to a county, to-wit, *the treasurer.* Section 166, page 319, Session Laws 1901, authorized the *county clerk,* under certain conditions, to make such assignment. This later act was repealed, however, by said act of 1902, and the county clerk had no power thereafter to make such assignment. The phrase being discussed shows in effect a construction by the treasurer of a legislative act, and is a mere conclusion indulged in by him as to what county officer is a proper one to make such assignment. Therefore the omission of the deed to state by name, or by his official title, the officer who made the assignment of the certificate, rendered the deed void on its face, and appellant's contention that the recital in the deed under consideration is not open to objection cannot be upheld.

Appellant further complains that he was seriously prejudiced by the court's ruling in denying his motion to file a so-called amended and supplemental complaint after the trial had been completed and both parties had rested. This contention is untenable. The trial was conducted and completed under the pleadings then before the court. After the case was closed (April 26th) the court took the same under advisement, and announced that it would render its decision at the opening of court on May 23rd, and allowed plaintiff fifteen days within which to present briefs, and defendants five days thereafter to answer.

It appears from the abstract that on August 15th the court announced that it was still in doubt as to the merits of the case, and would take further time in order to have the stenographer inform it concerning certain evidence that had been given at the trial. Thereafter, on September 16th, 1910, the court rendered its judgment in favor of defendants. At this time the said motion to amend the pleadings was presented, being supported by affidavits. The court overruled the motion, giving, as we think, satisfactory reasons therefor.

There are other reasons why the court did not err in overruling the motion to amend:

(1) From an inspection of the so-called amended and supplemental complaint, it appears that there were only two matters therein pleaded which had not already been pleaded before the trial, the first of which was a detailed recital of all the acts of the treasurer before and at the tax sale of 1898, which recitals conflicted with those contained in the void tax deed excluded from evidence. In *Emerson v. Valdez, supra,* we decided that in a case of this kind, evidence *aliunde* for the purpose of showing that all preliminary steps taken by revenue officers up to the time of the tax sale were valid in all respects, was not admissible to contradict the positive recitals of a tax deed void on its face. Therefore, evidence tending to prove such recitals would not have been admissible even had such complaint been filed.

(2) The amended-supplemental complaint set up the statute of limitations incorporated in Section 2923, Mills' Annotated Statutes (Revised Supplement), which reads in part as follows:

"Actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record * * * shall be brought within

seven years next after possession being taken as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

This statute of limitations appears to be available as a plea in bar only in an action brought to recover lands against one who, at the time suit is brought, is in the possession of, and for seven successive years has actually resided upon, the disputed premises.

Three facts must exist to sustain the defense: (1) The person sued must be in possession; (2) he must have been an actual resident upon the land for seven successive years after going into possession; (3) during all this time he must have had a connected title in law or equity deducible of record. Bearing this in mind, plaintiff's original complaint and replications show that he was not entitled to invoke this statute in bar of the fee simple title pleaded by defendants, as the only title claimed or relied upon by plaintiff was that emanating from his tax deed recorded July 22, 1902. The suit was begun January 30, 1909, being six years, six months and eight days after the recording of the tax deed. This fact makes it clear that it would have been impossible, at the trial, for plaintiff to prove that he had been an actual resident upon the premises for seven successive years from the time the tax deed was recorded—in other words, from the time he acquired his title to the time the suit was begun. Therefore if the court had permitted the said complaint to be filed, plaintiff could not have proved the facts necessary to establish the defense we are considering. When this action was commenced it arrested the running of the statute of limitations now under consideration.

Section 3904, Mills' Annotated Statutes, pleaded by plaintiff (known as the short statute of limitations), is not available in an action simply to quiet title.—*Munson v. Marks,* 52 Colo., 553, 124 Pac., 187; *Carnahan v.*

Hughes, 53 Colo., 318, 125 Pac., 116; *Empire R. & C. Co. v. Mason,* 22 Colo. App., 612, 126 Pac., 1129; *Beaver v. Cook,* 23 Colo. App., 199, 128 Pac., 878.

Plaintiff also pleaded the seven years statute of limitations, Section 2923e, Mills' Annotated Statutes (Revised Supplement), based upon actual possession under claim and color of title made in good faith and payment of all taxes for seven successive years. This attempted defense is wholly unsupported by the evidence.

We discover no error in the court's ruling. The judgment will be affirmed.

Judgment Affirmed.

[No. 3722.]

COOK'S ESTATE ET AL. *v.* FIEDLER ET AL.

1. APPEALS—*Motion to Strike Bill of Exceptions—Time.* The transcript of the record, and the bill of exceptions, were filed here January 9, A. D. 1911; the abstract of the record, March 18th, A. D. 1911, and appellant's brief, April 5, A. D. 1911. July 22, A. D. 1913, appellee filed a motion to strike out the bill of exceptions because never filed in the office of the clerk of the lower court. Doubted if the motion was in apt time.

2. —— *Leave to Withdraw the Bill of Exceptions,* so as to enable appellant to procure the clerk's certificate to the filing thereof in the court below, granted; and *held,* there being no dispute as to the authenticity of the document, no memorandum in the court *a quo,* is necessary to entitle the appellant to supply the omission.

Appeal from Summit District Court. HON. CHARLES C. CAVENDER, Judge.

Mr. JOSEPH N. BAXTER, for appellants.

Messrs. JAMES T. HOGAN and QUENTIN D. BONNER, for appellees.

MORGAN, J.

Appellees move to strike the bill of exceptions because it was never filed in the lower court and contains

no certificate of the clerk identifying it, although it was tendered in due time, bears the seal and signature of the judge, there is no contention as to its being the original bill, and two years and six months have passed since it was filed in this court along with the duly certified transcript of the clerk's record.

The bill of exceptions was tendered November 25, the clerk certified to the record, proper, December 13, and the bill was signed and sealed by the judge, December 25, 1910. The transcript and the bill were filed here January 9, abstract of the record March 18, and appellants' brief April 5, 1911. No appearance by appellee until this motion was filed July 22, 1913.

It is doubtful if this motion is in apt time.—*Merriner v. Jeppson,* 19 Colo. App., 218, 74 Pac., 341; *Board of County Comrs. v. Tully,* 17 Colo. App., 113, 67 Pac., 346; *Reynolds v. Campling,* 21 Colo., 86, 39 Pac., 1092; *Pacific Life Ins. Co. v. Van Fleet,* 47 Colo., 401-3, 107 Pac., 1087.

Appellants ask leave to withdraw the record, however, so as to supply the omissions of the clerk's filing stamp and certificate as to the bill of exceptions, and granting such leave makes it unnecessary to announce a positive rule as to the laches of the appellees. Appellees strenuously resist such request and have asked leave to file a copy of the register of actions and fee book of the lower court, and an affidavit of the clerk thereof, that the bill of exceptions was never in the hands of the clerk. Appellees may file the same with the clerk of this court, but leave is granted appellants to withdraw the record and supply the omissions, for the reason that no rule of law will be abrogated thereby and justice demands it. The carelessness of appellants in failing to have the clerk file, and certify to the identity of, the bill before filing it here is not condoned, but, as our courts have been liberal in permitting such amendments, where no injustice is done, it may be permitted here.

As far back as 1873, in the case of *Eldred v. Malloy*, 2 Colo., 20, 22, this question was before the court, and from the opinion by Wells, J., we learn that, although a bill of exceptions must be tendered to the judge within the term, or within such time as the court may allow thereafter, yet if signed and sealed within the time limited, it may be filed at any subsequent day. And although it must appear by the record to have been actually filed at some day, nevertheless it may be withdrawn for amendment. The opinion states:

"But in the present case the file mark is wanting, and there is nothing to supply it, except the affidavit of counsel, which we cannot consider. If counsel for the plaintiff in error desire, the cause may stand over, in order that the record may, in this respect, be perfected."

"It will, we think, be sufficient if the probate judge shall certify that the bill of exceptions, which has been included in the record certified, was filed in his office, at any day prior thereto; it need not be certified that it was marked filed, but the certificate must specifically refer to the bill of exceptions now in the record before us; or counsel may, if preferred, cause the bill of exceptions to be hereafter filed in the probate court, and procure a further transcript of the record, containing the bill of exceptions at large, prefaced by the clerk's recitation as to when it was filed. For this purpose five days will be allowed."

Cases cited by appellees sustaining a motion to strike the bill of exceptions, where no request was made to amend, or where such amendment would necessarily allow new matter to be inserted in the bill, in the nature of a new bill, after the time allowed for tendering in the lower court, are not controlling. Such as *Pettit v. The People*, 24 Colo., 517, 52 Pac., 676; *Fick v. Crook*, 27 Colo., 429, 62 Pac., 196, 832.

In the following cases permission has been granted

to amend on grounds that do not appeal to us as forcibly as those here presented: *Pleyte v. Pleyte,* 15 Colo., 44, 24 Pac., 579; *Patrick et al. v. Weston,* 21 Colo., 73, 74, 39 Pac., 1083; *McKenzie v. Murphy,* 29 Colo., 485, 7, 68 Pac., 838; *Wellington et al. v. Beck,* 43 Colo., 70, 71, 95 Pac., 297.

In the case of *Jewel v. Sais,* 22 Colo. App., 377, 123 Pac., 830, this court struck the bill of exceptions from the files, but "without prejudice to appellant's right to apply to the lower court for such further orders or action as he may be advised." In that case the bill had not been signed, sealed, nor settled by the judge of the lower court, nor had it been filed therein, nor certified to, by the clerk thereof.

From that case and the foregoing, it may be said that two things are necessary duly to make a bill of exceptions a part of the record, (1) a timely tender to, and the signature and seal of, the judge; (2) the filing with and the certificate of the clerk; and that if either of these requirements fully appear from the record lodged here, and no injustice be done by allowing an amendment, the bill may be withdrawn for such purpose, and the motion to strike denied.

Appellees contend that this amendment cannot be permitted because there is "no memorial, memorandum, entry or writing of any kind on which to base the correction." In this instance none is required. A mere failure to file and certify to a bill of exceptions that has been duly presented, tendered, signed, sealed and settled by the lower court is not such an omission that cannot be supplied without a memorandum in the lower court, where it is not disputed that it is the original bill.

The motion is denied and permission granted to withdraw the bill of exceptions for a period of twenty days from notice hereof in which to apply to the clerk of the

lower court to file the same on any date within said time and to obtain the necessary certificate of the clerk to be attached thereto, and in which to return the same to this court.

[No. 3789.]

JACKSON v LARSON ET AL.

1. LIMITATIONS—*Color of Title—What is*, is a question for the court.

2. —— *Void Deed.* A treasurer's deed, upon sale of land for taxes, void upon its face, is admissible to show color of title, even though there is no evidence that notice was given to the owner of the intended demand for the deed, or that the assessed value of the land was such as to render the notice unnecessary (Rev. Stat., sec. 5727).

3. —— *Good Faith.* The good faith of the party claiming under a color of title is a question of fact.

4. TRIAL—*General Finding.* A general finding concludes all issues upon which the evidence is in conflict.

Oral remarks of the presiding judge in giving reasons for his conclusion have no effect to impair the force of the findings afterwards formulated and entered of record.

5. APPEALS—*Findings on Sufficient Evidence*, though conflicting, are conclusive upon appeal.

Appeal from Weld District Court. HON. NEIL F. GRAHAM, Judge.

MR. JOHN T. JACOBS, for appellant.

MESSRS. DELPH E. CARPENTER, HERBERT M. BAKER, and R. E. WINBURN, for appellees.

BELL, J.

This is an action to quiet title under Section 255, Mills' Annotated Code, brought by Eric Larson and Edwin T. Larson, appellees, in the district court of Weld County, against Jerome F. Culp, a former owner of the title to the west half of Section 19, Twp. 11 N. of R. 61 W. of 6 P. M., in said county, which is here in controversy.

It seems that the Union Pacific Railroad Company, the patentee from the government, transferred said property to Jerome F. Culp above named, who neglected to pay the taxes thereon, and the treasurer of said county sold the same for the taxes so due, and the county bought it in, assigned the certificate of purchase to John Sedgwick, who, on December 17th, 1901, received a treasurer's deed to all of Section 19 aforesaid, and, by a quit-claim deed, bearing date January 27th, 1902, and acknowledged in 1904, purported to convey the west half of said Section 19 to the appellees herein. The evidence shows that, in the early spring of 1902, the appellees took possession of the last named property, and fenced the same thereafter, and, beginning July 1st, 1902, paid all taxes legally assessed there against for seven consecutive years, then brought this suit against Jerome F. Culp, the grantee of said railroad company. The said Culp defaulted, and made no defense to the action, and, on the 20th day of November, 1909, executed and delivered to James B. Jackson, appellant, for an expressed consideration of $100, a quit-claim deed for said west half of Section 19; and on the 16th day of December, 1909, by stipulation of the parties hereto, the said Jackson was made a party defendant, and afterward filed an answer, and later an amended answer and cross-complaint, setting up the invalidity of the treasurer's deed, and averring that said treasurer's deed was void upon its face, and the sole foundation of any claim or right the appellees had in the premises. By cross-complaint said Jackson set up his title to the premises, and asked that it be quieted in him. The appellees, in their replication, among other things, set up the two seven year statutes of limitation.

It is admitted by counsel that the treasurer's deed is void upon its face, and if offered in evidence to establish the paramount title to the property, that it would be inadmissible. However, in this case it was offered merely

as evidence of color of title. It was also objected to because the appellees did not show nor offer to show that the assessed value of the land was under $500, nor that notice was given to the owner of the intended demand on the treasurer for a deed. There is no evidence on these subjects from either side, and the court held that, for the purpose of proving color of title, for which the deed was offered, it was admissible; and it is our opinion that the ruling of the trial court in this respect was proper.

A color of title is a mere pretence of title, but not a valid title. It purports to be a good title, but is not so in fact.

In *Lebanon Mining Co. v. Rogers*, 8 Colo., 34-37, 5 Pac., 661, the court said:

"In *Wright v. Hattison*, 18 How. (U. S.), 56, it is said that 'the courts have concurred, it is believed, without an exception, in defining color of title to be that which has the appearance of title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith.' "

It will be noticed from this decision of the United States court, approved by our own supreme court, that "no importance is attached to the ground of invalidity of an apparent or colorable title."

Counsel for appellant vigorously contends that a treasurer's deed, similar to the one before us, was held incompetent evidence in *Richards v. Beggs*, 31 Colo., 186, 72 Pac., 1077. There is no intimation in that case that the treasurer's deed was offered merely as a colorable title to support the possession and payment of taxes under the statutes of limitation. The court held, however, that it was incumbent upon the parties claiming real estate under

a tax deed to prove, either that the statutory notice was given, or that the assessed valuation rendered it necessary to give such notice before the deed would be admissible in evidence. This is the undoubted rule where the treasurer's deed is offered to establish the paramount title. However, the rule is to the contrary where the deed is offered as a mere color of title. A tax deed, invalid upon its face, has been repeatedly held to be a color of title in this jurisdiction.—*De Foresta v. Gast,* 20 Colo., 307, 38 Pac., 244; *Hogue v. Magnes,* 29 C. C. A., 564, 56 U. S. App., 500, 85 Fed., 357; *Bennett v. N. C. S. L. & I. Co.,* 23 Colo., 470, 56 Am. St. Rep., 281, 48 Pac., 812; *Brinker v. U. P. D. & G. R. Co.,* 11 Colo. App., 166, 55 Pac., 207; *Williams v. Conroy,* 35 Colo., 117, 83 Pac., 959.

If it were a rule that a tax deed, void upon its face, was inadmissible in evidence to prove color of title, then such a deed could not be held good as a color of title, as there would be no way to use it beneficially.

In *De Foresta v. Gast, supra,* the supreme court said that a tax deed gives color of title, even though a person of legal learning and experience may, by a critical examination, discover defects in the instrument fatal to its validity.

Counsel for appellant contends that our seven year statutes of limitation were taken literally from those of the state of Illinois, and, when we adopted the statutes, we adopted the construction placed upon them by the courts of that state, and cites the cases of *Bowman v. Wettig,* 39 Ill., 416, and *Dalton v. Lucas,* 63 Ill., 337, as cases directly in point and decisive of the case before us.

The Illinois cases cited were unfortunately based upon the erroneous doctrine that a person who buys property at a tax sale will be presumed to be familiar with the provisions of the constitution and statutes pertaining to securing titles thereunder, and if such a purchaser secures a deed void upon its face, he is presumed to know

the law, and he cannot be said to be holding the premises under color of title in good faith.

Both of these holdings by the Illinois court have been repudiated by the subsequent decisions of the courts of the state of Colorado, and likewise by the courts of the state of Illinois. It was said in the case of *De Foresta v. Gast, supra,* that a tax deed regularly executed gives color of title, though an expert or lawyer might, by inspection, see that it was void upon its face, and, in *Brinker v. U. P. D. & G. R. Co.,* 11 Colo. App., 166, 55 Pac., 207, it was held, in direct conflict with the case of *Bowman v. Wettig,* that a tax deed which issues before the period of limitation expires is a valid color of title. The supreme court of Illinois, in speaking of the doctrines announced in the Bowman-Dalton cases, *supra,* said:

"It is claimed that the cases of *Bowman v. Wettig,* 39 Ill., 416, and *Dalton v. Lucas,* 63 id., 337, establish the doctrine that defendant was bound to know the law, and to know that the verbal contract for the land could not be enforced, and that the decree for its enforcement was erroneous, and therefore he was guilty of bad faith in so acquiring the deed. Such a doctrine would abrogate the statute (of limitation) and require the party claiming its benefit to establish a valid title, and in the case of *Davis v. Hall,* 92 Ill., 85, it was said that the apparent teachings of the opinion in *Bowman v. Wettig, supra,* had not been adhered to in the later cases. The decision in *Dalton v. Lucas* was based on the prior case of *Bowman v. Wettig,* but if given full effect it could not influence the decision in this case."—*Sexson v. Barker,* 172 Ill., 361-366, 50 N. E., 109.

It would seem that the above and other later Illinois decisions have limited the Bowman-Dalton cases as authority to such cases as involve a knowing and intentional omission by a purchaser at a tax sale to give the notice

required by statute, and thereby keep the owner in ignorance of his rights.—*Sexson v. Barker, supra,* 367.

In *Miller v. Pence,* 132 Ill., 149, 23 N. E., 1030, the court had under consideration the requisites of a notice prior to introducing the deed as evidence of color of title, and the supreme court of Illinois said:

"The statute requires notice to be served on the person in whose name the land was taxed, * * * as a condition to obtaining a deed, * * * and, as this requirement of the statute was not observed, the tax title cannot be held to be paramount title. But, * * * those deeds constituted color of title; and it appears from the evidence that appellee entered into possession of the premises in 1879 under color of title, and remained in possession for more than seven successive years, and during that period paid all taxes assessed on the premises. The color of title thus established, with proof of possession and payment of taxes, clearly brought appellee within Section 2 of the Act of 1839."

See also *Morrison v. Norman,* 47 Ill., 477-479.

The court in the Bowman-Dalton cases, as a presumption of law, held that possession under color of title under the tax deeds was not held in good faith. That doctrine has been repudiated by the subsequent decisions of the courts of Colorado and Illinois. Our supreme court, in speaking to this question, said:

"As has been said by the supreme court of Illinois construing this statute: 'The law presumes that all men act in good faith, until there is some evidence to the contrary'; and again: 'Color of title made in good faith is shown by any deed or instrument which purports on its face to convey title which a party is willing to and does pay his money for, apart from any fraud. The deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it had no faith or confidence in it.' "—*Knight v. Lawrence,* 19 Colo., 425-433, 36 Pac., 242; *Sexson v. Barker, supra,* 365.

A color of title, or what it is rather, is a question of law, to be decided by the court on an inspection of the paper title presented. The good faith of the party claiming under the color of title is a question of fact to be decided on sufficient evidence.—*Latta v. Clifford,* 47 Fed., 614; 2 Ency. L. & P., 409-411.

The appellant offered no evidence whatever as to the bad faith of the appellees or their grantor in securing or holding the premises. The appellees and the grantee in the tax deed went upon the stand at the trial, and each testified to the good faith of these transactions.

If we should admit, for argument's sake, that the Bowman-Dalton cases are authority for the purposes cited, even then they would not apply to this case, as they limit their application to the grantee in the tax deed, as is said in the syllabus of *Bowman v. Wettig, supra,* page 418:

"But a purchaser from a grantee in a tax deed, which was executed before the expiration of two years from the sale, would not be held to notice of the illegality appearing on its face."

And in *Dalton v. Lucas, supra,* at page 339, it is said that:

"A subsequent grantee would not be affected by the laches of a purchaser at a tax sale, but the party himself, having omitted a plain duty enjoined upon him by law, will be considered as having done so for a sinister purpose, and will not be permitted to avail of a deed procured by such neglect."

This seems to be a complete answer to the contention of appellant that appellees could not tack their possession under the quit-claim deed to the possession of Sedgwick under the treasurer's deed.

As we understand, appellant's contentions are, first, that the treasurer's deed was void upon its face, hence not a valid color of title, and that appellees failed to show

the amount of the assessment or notice of demand for the deed; secondly, that, while the quit-claim deed bears date January 27th, 1902, it was not signed nor delivered until 1904; thirdly, that, assuming said deed was delivered in 1904, and that the possession thereunder could not be tacked to the possession under the treasurer's deed, there was not a holding under color of title for seven years, hence the seven year statute, providing for a holding under a claim and color of title, did not operate.

The trial court, upon conflicting evidence, found that the quit-claim deed was signed and delivered about the 27th day of January, 1902, and that the appellees early in the spring of that year took possession of the property, fenced it, and in the month of July following commenced the payment of taxes, and completed their title by holding under said quit-claim deed in good faith and by paying all taxes legally assessed there against for seven years; but said nothing about the holding under the tax deed in its oral announcement. However, in its ultimate written findings and decree filed in court, it said:

"(The court) doth find the issues herein joined generally in favor of said plaintiffs on their complaint, answer and replication, and against the defendant Jackson, on his amended answer and counterclaim and replication."

This was a finding and decree upon all issues where there was conflicting evidence, and the oral announcements of the court, upon which appellant's counsel bases his argument, are but the reasons given for its decision.—*County Commissioners of Montezuma County v. Frederick,* 50 Colo., 465, 115 Pac., 514; *Stough v. Reeves et al.,* 42 Colo., 432, 436, 95 Pac., 958.

In the latter case the supreme court said:

"Counsel for appellant has included in the bill of exceptions and in the abstract of the record the oral remarks made by the court at the time of the rendition

of the judgment, instead of the findings formulated and signed by the court and entered of record as its ultimate findings of fact and conclusions of law, and counsel predicates much of his argument upon some expressions found in the oral disquisition of the judge as to the specific objection that the description was subject to. We can consider only the ultimate conclusions of the court as expressed by the record, and we are not concerned with the reasons by which the court below arrived at such conclusion."

In the Stough case, *supra,* in the oral announcement of the trial judge, he found on a minor objection that the tax deed was invalid, and did not mention many other, more substantial, objections. However, in his recorded conclusions and decree, the finding was general. The supreme court held that his conclusion on the minor objection was erroneous, but sustained the decree on the more substantial objections to the deed, which were not mentioned by the trial judge in his oral announcement.

We have examined the evidence as to the time when the quit-claim deed was signed, and all the circumstances attending the transaction; and we think that there is sufficient evidence to sustain the findings and decree of the court, and also to support the finding that the quit-claim deed was signed and delivered early in the year 1902. The mere fact that the appellee, Eric Larson, was uncertain as to when the deed was signed and delivered did not prevent the court from considering the evidence of the grantor and the attending circumstances as sufficient to justify its conclusion, and we are concluded by these findings made upon conflicting evidence.—*Denver etc. Co. v. McDonough,* 54 Colo., 515-517.

The findings of the trial court are affirmed, with costs.

CUNNINGHAM, Presiding Judge, specially concurring:

I concur in the result reached in the majority opinion in this case, but base my concurrence entirely upon the

rule laid down in *Bowman v. Wettig,* 39 Ill., 416, and in *Dalton v. Lucas,* 63 Ill., 337, wherein it is held that:

"A purchaser from a grantee in a tax deed, which was executed before the expiration of two years from the sale, would not be held to notice of the illegality appearing on its face."—*Bowman v. Wettig, supra.*

And:

"A subsequent grantee would not be affected by the laches of a purchaser at a tax sale, but the party himself, having omitted a plain duty enjoined upon him by law, will be considered as having done so for some sinister purpose, and will not be permitted to avail of a deed procured by such neglect."—*Dalton v. Lucas, supra.*

On all other points the majority opinion, as I view it, is diametrically opposed to the rule announced by our supreme court in *Richards v. Beggs,* 31 Colo., 186, 72 Pac., 1077. It is true, as is said in the majority opinion, that in the Richards case:

"There is no intimation in that case that the treasurer's deed was offered merely as colorable title to support the possession and payment of taxes under the statutes of limitation."

But it is equally true that there is nothing in the Richards opinion which indicates any limitation whatever upon the rule therein announced, which is unequivocal, that a tax deed is not admissible in evidence to establish title to real estate unless it first be proven, either that the statutory notice was given of when the time for redemption would expire before the deed was issued, or that the assessed valuation was less than $500. The two closing sentences of the opinion in the Richards case are too plain to require construction or to warrant cavil, and they read as follows:

"No presumptions obtain that the preliminaries which authorize the issuance of a tax deed have been observed, or that the conditions necessary for its issuance

existed, except as suggested by statute; hence, so far as the authority of the treasurer to issue a tax deed is dependent upon the conditions contemplated by the section under consideration, that must be shown to exist by evidence *aliunde,* for the deed itself would not prove them. *It is, therefore, incumbent upon the parties claiming title under a tax deed to prove, either that the statutory notice was given, or that the assessed valuation rendered it unnecessary to give such notice before the deed would be admissible in evidence.*" [The italics are mine.]

If the seven year statute of limitations were satisfied by the mere proof of color of title, there would be much force in the position taken in the majority opinion that a tax deed void on its face, when offered as color of title only, ought to be admitted, without requiring of the holder of such deed preliminary proof that he had complied with the statutes pertaining to notice; but the seven year statute requires more than color of title; it requires good faith, and while many authorities hold that good faith will be presumed, it ought not to be presumed in favor of one who relies for his title on a deed clearly void on its face, and where the invalidity of his deed is due to his own failure or omission to comply with a statutory requirement. As was well said by the supreme court of Illinois in *Dalton v. Lucas, supra:*

"But the party himself, having omitted a plain duty enjoined upon him by law, will be considered as having done so for some sinister purpose, and will not be permitted to avail of a deed procured by such neglect."

The neglect of a grantee in a tax deed to comply with a statute is a fraud in law, if not a fraud in fact, and certainly sufficient to overcome all presumptions of good faith on his part. To hold that a tax deed like the one here before us cannot be admitted in evidence when offered as paramount title, but must be admitted when offered as color of title held in good faith, is, to my mind,

illogical. Whether the tax deed holder rests his title upon the tax deed alone, or upon that instrument, plus the statute of limitations, in either case he must, before he can prevail, have his deed admitted. If his failure to give the statutory notice of his intention to take a deed bars the admission of the deed when offered for one purpose, it seems logical to hold that it bars it for any purpose. At any rate, this is the rule of evidence announced by our supreme court in *Richards v. Beggs, supra,* and with that ruling I am in complete accord. To permit the holder of a tax deed who has ignored, presumptively from some sinister purpose, the provisions of the statute pertaining to the giving of preliminary notice, to avail himself of the statute of limitations, is to encourage a disregard of the statutes by offering a premium therefor. Where one, without any explanation whatever, disregards a duty imposed upon him by statute, it ought to be presumed that he did it wilfully and intentionally, and for a sinister purpose, and, in the absence of all proof, he ought not to be permitted to reap a benefit from his own wrongdoing.

Under the rule announced in the majority opinion, a confessed violator of the law may present his self-tainted tax title to a court of equity and have it purified by the chancellor. The oscillations of the judicial pendulum between the rule of strict and the rule of liberal construction, as applied to tax deeds, is regrettable.

It is stated in the majority opinion that, "a tax deed, invalid upon its face, has been repeatedly held to be color of title in this jurisdiction." While, literally, this statement is supported by the opinions cited, I undertake to say that there is no opinion in this state which has held that a tax deed void on its face, and whose invalidity was due entirely to omissions on the part of the grantee himself, which omissions are presumptively due to a sinister purpose, can constitute color of title under our seven

year statute to the advantage of such grantee. None of the cases cited from this state meet the conditions that I have here outlined, and therefore, they are not in point. The deed in *DeForesta v. Gast,* 20 Colo., 308, 38 Pac., 244, was claimed to be void on its face because it showed a sale and conveyance of several distinct parcels of land *en masse,* whereas the statute in force at that time required a separate sale and conveyance of each parcel. The court in the DeForesta case (p. 309) held that:

"There is nothing in our statute which requires separate deeds for each piece of property sold, where the purchaser of the several tracts is the same person."

Citing *Waddingham v. Dixon,* 17 Colo., 223, 29 Pac., 177, where the point had been so held. The opinion in the DeForesta case further held (p. 310) that where the deed by its recitations showed that the tax proceedings were "in substantial conformity with the requisitions of the statutes in such case made and provided," it practically supplied any defects in the accompanying recitals. But even this doctrine has been repudiated by our supreme court time and time again, and it has been frequently ruled, since the DeForesta opinion was handed down, that such deeds are absolutely void.

In the case of *Williams v. Conroy,* 35 Colo., 117, 83 Pac., 959, cited in the majority opinion, it is specifically said (p. 120) that:

"Plaintiff's tax deeds were regular and valid on their face, though because of invalidities in the sale they are, as a matter of law, void."

Here is the plain distinction between the *Williams* case and the case at bar. Again, on the same page, it is said:

"These tax deeds, though valid on their face, are void for the same irregularity which affects the plaintiff's earlier ones."

This is sufficient to demonstrate clearly, I think, that

the *Williams* case cannot properly be cited to support the conclusions reached in the majority opinion.

In *Whitehead v. Callahan,* 44 Colo., 399, 99 Pac., 57, Chief Justice Campbell, speaking for the court, said:

"If this tax deed was void, especially if it was void upon its face, as the court found it was, which holding we have elsewhere herein affirmed, defendant's occupancy of the land in controversy under it was a trespass."

The query naturally arises, just how long one must persist in a trespass in order that a spurious title under which he trespasses shall ripen into an unassailable title? The majority opinion says seven years.

In *Emerson v. Shannon,* 23 Colo., 274, 47 Pac., 302, Chief Justice Hayt ruled that a tax deed showing on its face that non-contiguous tracts of land were sold together for a gross sum, was, under uniform holdings of the authorities, "absolutely void." In that case it should be borne in mind that the irregularity appearing on the face of the deed was not due to culpable wrong on the part of the grantee, but error on the part of the county treasurer. This ruling was upheld in *Webber v. Wannemaker,* 39 Colo., 428, 89 Pac., 780. It is true that in the *Webber* case, and also in the Emerson case, it is said that such deeds are "not admissible to support a title," and the majority of the court in the instant case seems to discover in this limitation a port of refuge, but if the deed in the present case was not sufficient to support a title, then it was utterly immaterial. It is not ruled in the *Williams* and *Emerson* cases that the deed becomes inadmissible only when it is offered as full and complete proof of title, but, on the contrary, it is held inadmissible when it is offered to *support* title.

In *Eaches v. Johnson,* 46 Colo., 457-9, 104 Pac., 940, it is said:

"The tax deed was not executed as required by sec.

3902, Mills' Ann. Stats., and was therefore not *prima facie* evidence of anything."

The statutes were violated in the instant case in the issuance of the deed here under consideration, and the statutes were violated *by appellee, the grantee in the deed named.*

In *Sayre v. Sage,* 47 Colo., 559-568, 108 Pac., 160, it is said that:

"The bar of the statute does not begin to run until the deed is recorded, for the reason that it is only after it has been filed for record that any title of the owner is conveyed."

And because the grantee in the tax deed in the *Sayre* case had withheld the same from record, the court in that case ruled that the deed, until recorded, did not even constitute color of title. In other words, it was the duty of the grantee in the deed to record the same, and until he complied with the statute in this behalf, he could not claim color of title. But it is no more the duty of a grantee of a tax deed to record the same than it is his duty to serve the notice of his intention to take the tax deed, and until he does serve such notice, the title and interest of the owner is not divested.

Section 3904, Mills' Ann. Stats., reads:

"No action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of deed therefor by the treasurer, any law to the contrary notwithstanding; * * *"

In *Sayre v. Sage, supra,* our supreme court ruled that section 3904, *supra* (commonly known as the short statute), does not bar an action to set aside a tax deed, upon the ground that it is void upon its face, citing many Colorado authorities. It is difficult to perceive any reason why a tax deed void on its face cannot set the five year statute of limitations in motion, but may set the seven year statute in motion. Again, in the *Sayre* case, p. 565.

it is held that a treasurer's deed to land sold for taxes is void, unless attested by the official or private seal of the treasurer. This, because the statute so requires; but the statute pertaining to attestation is no more imperative than the statute which requires the grantee in a tax deed to serve notice of his intention to take the deed. If he may not disregard one statute, he may not disregard another.

As early as the 6th Colorado, our supreme court ruled that a tax deed which bore on its face the evidence of non-compliance with a substantial requisition of the law was a nullity. See *Gomer v. Chaffee,* 6 Colo., 317. It is true that in that case the court had the short statute under consideration, but this ought to make no difference. In the course of the Gomer opinion the supreme court said:

"It is difficult to see how the statute of limitations can avail a defendant holding a *void* tax deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor right of actual possession. The limitation is intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of law," citing many cases.

In *Empire Ranch & Cattle Co. v. Coldren,* 51 Colo., 121, 117 Pac., 1005, our supreme court uses this language:

"The clerk had no authority to assign the certificate after the lapse of three years, and the assignment was void. An assignment was essential to the issuance of deed. A deed executed upon a void assignment is in self void and conveys no title. The tax deed is, therefore, upon its face, a nullity."

This reasoning is applicable to the facts before us. The treasurer had no authority to issue the deed we are here considering, unless and until the holder of the tax

certificate, who was demanding a deed, had served notice upon the original owner, or had made a showing that the land was worth less than $500. Such notice was essential to the issuance of deed. A deed executed without such notice is itself void, and conveys no title. Hence the tax deed before us is, therefore, upon its face, a nullity. It will, therefore, be seen that whatever may have been the holdings of the earlier Colorado cases, the later decisions are all to the effect that a deed void on its face is a nullity, and that one who holds possession under it is a trespasser. But, as I have tried to point out already, there is no early Colorado case holding that a tax deed void on its face is sufficient to support color of title, where the invalidity is due to the wrongful acts of the grantee in such deed named. The great weight of modern authority everywhere is against the rule that a tax deed void on its face can set in motion a statute of limitations like our own, which requires the concurrence of three things, *viz.*, color of title; claim under it; and that claim made in good faith.

In *Evans v. Welch*, 29 Colo., 364, 66 Pac., 776, it is said that:

"All presumptions are in favor of the legal holder and the burden of overcoming them rests with him who assails the legal title."

Therefore, in my judgment, there can be, in an action brought by one who claims title under a tax deed, no presumption of good faith. But certainly, if such presumptions may be indulged in, under certain circumstances, it is overthrown by positive record evidence of bad faith. I am in entire accord with the views of the supreme court of Oklahoma as expressed in *Keller v. Hawk*, 19 Okla., 407 (413), 91 Pac., 778, wherein it is said:

"The legislature did not intend that time should breathe life and force into an instrument upon the face of which it could be seen that it was absolutely void. The

law of limitations was intended to protect purchasers at tax sales, and their grantees, from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which, under the law, persons dealing with the title are bound to know."

The supreme court of Wyoming is to the same effect. See *Matthews v. Blake,* 16 Wyo., 116, 92 Pac., 242. The majority opinion in the instant case breathes life and force into an instrument upon the face of which it can be seen that it is absolutely void, *because of the culpable acts of the grantee therein named.*

It should not be forgotten that this is an equity case, and that equity maxims are applicable. Equity regards that as done which ought to be done, and, I suppose, it will regard that as not having been done which can only be done in flagrant violation of law. In *Richards v. Beggs, supra,* Justice Gabbert says:

"A tax deed cannot issue upon a tax sale certificate without previous notice of the time when the right to redeem would expire, unless the assessed valuation upon which the sale was based was less than $500."

But the effect of the majority opinion in this case is that while a tax deed cannot, or ought not to, so issue, nevertheless it has, and has issued at the instigation of the appellee in this case, and to his benefit. By his own wrong he becomes the owner of the land in question, if the majority opinion shall stand as the law of this state.

There is another reason which, to my mind, is sufficient, why the preliminary notice must be proven as a condition precedent to the admission of the tax deed; this notice is necessary to cut off the right of the fee holder to redeem from the tax sale, and until he is so served, the owner of the fee may unsuccessfully assert his right of redemption, and therefore, if the tax deed has

been admitted in evidence by the court, it could have availed appellee nothing.

The ruling of the trial court in admitting the tax deed was, in my opinion, erroneous.

[No. 3765.]

SEDGWICK v. CULP ET AL.

Judgment reversed on the authority of the judgment in *Jackson v. Larson, ante* 548.

Appeal from Weld District Court. HON. NEIL F. GRAHAM, Judge.

Messrs. DELPH E. CARPENTER, HERBERT M. BAKER and R. E. WINBOURN, for appellant.

Mr. JOHN T. JACOBS, for Appellee Jackson.

BELL, J.

This action was brought by John Sedgwick, as plaintiff, against Jerome F. Culp and James B. Jackson, defendants, for the purpose of quieting the title in said Sedgwick to one-half of section 19, twp. 11, N. of R. 61 W. of 6 p. m., in Weld county, Colorado.

At the trial plaintiff offered in evidence, as color of title, a treasurer's tax deed to the land in question without showing that notice of the intention of said Sedgwick to apply for a treasurer's deed had been given as required by law, or that the assessed value of the property was such as to make the giving of notice unnecessary. The tax deed was admitted to be void upon its face. The deed offered was excluded by the court, and, thereupon, the plaintiff was denied the benefit of his plea of the statute of limitation based upon his possession and payment of taxes for seven successive years under claim and color of title made in good faith.

At this term of court, in the case of *James B. Jackson v. Eric Larson et al.,* No. 3789, the identical treasurer's deed here involved was under consideration, and was held to be admissible in evidence as color of title, and the decision in that case on that point is decisive of this case also, and for the reasons here given we hold that the court erred in excluding said deed as evidence of color of title, and the judgment must be reversed.

Reversed and Remanded.

CUNNINGHAM, P. J., dissenting.

KING, J., specially concurring.

CUNNINGHAM, Presiding Judge, dissenting:

I have expressed my views concerning the conclusions reached in this case in my specially concurring opinion in *Jackson v. Larson,* No. 3789.

Specially concurring opinion by KING, J.:

For the reason that the opinion of the court reversing the judgment herein is a memorandum opinion, based upon the finding of the majority of the court upon one point considered and determined in *Jackson v. Larson et al.* (No. 3789), handed down at this term of the court, and wherein the presiding judge submitted a specially concurring opinion, which, in fact, is a dissenting opinion as to the only question in issue in this case; and because in that case the conclusion reached affirming the judgment of the trial court is right under all the authorities, without reference to the question that is decisive of the instant case; and, further, because, in my judgment, the views announced by the presiding judge in his dissenting opinion as to the question here necessary to decide are at variance with the decisions of our own supreme court,

and, if accepted, so fraught with danger to established property rights, I feel justified in presenting this supplemental opinion.

August 2, 1909, the plaintiff Sedgwick, in possession of the premises, brought a suit against Culp in usual form to quiet title. Culp made no defense, but long after suit was begun, defendant Jackson took his title to the premises by quitclaim deed, and with it his lawsuit. On December 16, 1909, Jackson made his appearance, and in March, 1910, his answer, claiming title under his quitclaim deed from Culp, the patentee. The plaintiff, for his title, relied upon a treasurer's tax deed issued to him, duly recorded, and under which he alleges that he went into actual possession under claim and color of title made in good faith, and that thereafter during more than seven years prior to the beginning of suit he remained in possession and paid all taxes assessed against said land under claim and color of title made in good faith. Defendant alleged that the tax deed was void on its face and for reasons *aliunde*, particularly that the land was assessed at a valuation in excess of five hundred dollars during the years for the taxes of which the land was sold, and that, notwithstanding such assessed valuation, Sedgwick, the purchaser and assignee of the certificates of purchase, failed to give the statutory notice of his intention to apply for a treasurer's deed prior to its execution and delivery. This latter allegation was put in issue by the pleadings, and there was no evidence offered by the plaintiff of the giving of said notice, nor proof by the defendant that such notice was not given. Upon trial, the plaintiff offered the treasurer's deed in evidence as color of title only, it being admitted that it was void on its face. Upon defendant's objection, the deed was excluded. The deed offered describes the land by legal subdivisions; recites the sale of the land to the county for delinquent taxes, the assignment of the certificates of purchase by

the county to Sedgwick, the payment of all subsequent taxes, giving the amount thereof, and by apt words in statutory form purports to convey the title to Sedgwick. The plaintiff offered to prove that at the time he accepted the deed he made inquiry of the county treasurer, and was told that the deed was a valid deed; that he entered into possession of the land in good faith, believing that his deed was valid, and paid the taxes assessed against the land for seven full years after the first payment of taxes, and had ever since been in possession; that all of said acts had been done by him under claim and color of title made in good faith; that during said time no other person had paid any taxes on the land or made any demands against the plaintiff for possession or claimed any right, title or interest therein, and that at all such times he was ignorant of the law requiring notice. Upon objection, the court refused to admit the proof offered.

The questions involved, and the only questions, are (1) whether the tax deed offered constituted color of title in plaintiff, and as such was admissible in evidence; and (2) whether such deed, together with the evidence offered by the plaintiff, constituted *prima facie* claim and color of title made in good faith.

It is asserted by the appellees, and by the presiding judge in his dissenting opinion in *Jackson v. Larson, supra,* that because the plaintiff herein (the deed being the same) failed to prove that he gave the statutory notice of his intention to apply for the treasurer's deed, the said deed was inadmissible as proof of anything, even color of title, but more particularly as proof of claim of title made in good faith; and it is also asserted that, assuming, as we may for the purposes of this discussion, that notice was not given, that fact alone is not only presumptive evidence of a sinister purpose in taking a tax deed, and overcomes the other legal presumptions (1) that all men are presumed to act in good faith, until the

contrary is shown, and (2) that the deed itself purports good faith, unless facts and circumstances attending its execution show that the party accepting it had no faith or confidence in it; but furthermore bars and precludes the claimant under such deed from offering any evidence which will show his good faith and explain his reasons for failing to give the statutory notice. In other words, that fact alone is conclusive proof of bad faith.

That a void deed, whether void upon its face or shown to be such by evidence *aliunde,* does constitute color of title sufficient to set in motion the seven-year statute of limitation, and is of itself evidence of "claim and color of title made in good faith," is announced by a continuous line of decisions of our supreme court, beginning with *Lebanon Mining Co. v. Rogers,* 8 Colo., 34, 5 Pac., 661, in an opinion written by Mr. Justice Helm in 1884, approved and amplified by Mr. Justice Elliott in *Knight v. Lawrence,* 19 Colo., 425, 36 Pac., 242, and *De Foresta v. Gast,* 20 Colo., 307, 38 Pac., 244; by Mr. Chief Justice Hayt in *Bennet v. N. C. L. & I. Co.,* 23 Colo., 470, 48 Pac., 812; by the court of appeals in *Brinker v. U. P., D. & G. Ry. Co.,* 11 Colo. App., 166, 55 Pac., 207; by Mr. Justice Gabbert in *Walters v. Webster,* 52 Colo., 549, 553, 123 Pac., 952, and by Mr. Justice Bailey in *Silford v. Stratton,* 54 Colo., 248, 130 Pac., 327, that opinion having been delivered in January, 1913. In *Lebanon Mining Co. v. Rogers, supra,* quoting from and adopting the views announced in *Wright v. Mattison,* 18 How. (U. S.), 56, after saying that the courts have concurred without exception in defining color of title to be that which has the appearance of title, but which in reality is not such, it is said:

" 'They have equally concurred in attaching no exclusive peculiar character or importance to the *ground of invalidity* of an apparent or colorable title; the inquiry with them has been whether there was an apparent

or colorable title under which an entry or a claim has been made in good faith.' " [Italics are mine.]

In *Knight v. Lawrence, supra*, at page 432, the court says:

"In our opinion the phrase 'color of title,' " (as applied to the statute of limitations) "refers to a *paper writing* purporting to convey title or to some writing whereby title is sought to be acquired," and further, "Possession and payment of taxes must, of course, be affirmatively shown by evidence in the first instance; and so also the acquisition of the paper title. But when such evidence does not disclose bad faith on the part of the party claiming under the statute, it would seem to be a work of supererogation to offer further evidence of good faith, unless in rebuttal of facts and circumstances shown by the opposite party. As has been said by the supreme court of Illinois, construing this statute: 'The law presumes that all men act in good faith, until there is some evidence to the contrary.' And again: 'Color of title *made in good faith* is shown by any deed or instrument which purports on its face to convey title which a party is willing to and does pay his money for, apart from any fraud. *The deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it had no faith or confidence in it.*' We see no reason to doubt the wisdom of the Illinois decisions." [Italics are mine.]

In *DeForesta v. Gast, supra,* the court said:

"The statute is intended as a protection to a person holding in good faith under a mere colorable title—that is, under a title which is really no title," and quotes with approval the words of Mr. Justice Field in *Hall v. Law,* 102 U. S., 466, to-wit:

" 'Whenever an instrument by *apt words of transfer* from grantor to grantee—whether such grantor acted

under the authority of judicial proceedings or otherwise —*in form* passes what purports to be the title, it gives color of title.' "

And again, and as applied to a tax deed:

"Moreover, the deed *in form* and by apt words purports to convey the land to the grantee by virtue of legal authority vested in the grantor (the county treasurer). The deed, therefore, must be held to give color of title, even though a person of legal learning and experience may by a critical examination discover defects in the instrument fatal to its validity as a muniment of title."

In *Bennet v. N. C. S. L. & I. Co., supra,* the court, having under consideration the same statute of limitation as applied to a tax deed void on its face, said:

"Under the decision in *Crisman v. Johnson, ante,* p. 264, such a tax deed is certainly void, but it does not follow that it is not sufficient to start the statute running. The phrase 'color of title' in the statute was before this court for consideration in the case of *DeForesta v. Gast,* 20 Colo., 307, and that case may be cited as authority for the proposition that a 'void deed, taken in good faith, may give sufficient color of title.'

"Applying the rule announced in that case to the case at bar, and it is apparent that the tax deed gives color of title. It is executed by the proper officer; gives a correct description of the property conveyed; alleges that the same was subject to taxation for the year 1877; that the taxes were assessed and remained due and unpaid at the date of the sale; that the sale was held by virtue of the authority vested by law in the treasurer. It states that Joseph Sharratt bid $121.55 for the property, this being the whole amount of taxes, interest and costs then due and remaining unpaid; that said sum was paid to the treasurer and the property was stricken off to Sharratt at that price. It recites, also, that three years had elapsed between the sale and the execution of the

deed, and the payment of all taxes by Sharratt accruing during this period. That such a deed furnishes sufficient color of title is well established by the great weight of authority."

In the case of *Brinker v. D. P., D. & G. Ry. Co., supra,* the court, by Bissell, J., said:

"It is insisted, and of course we must concede that this position is supported by a good many authorities, that a deed void on its face cannot make color *because its apparent invalidity necessarily destroys the good faith* which is as important to furnish a basis for the application of the statute as the possession of the deed purporting to transfer the title. It is insisted with much force and learning that a void deed which will make color can only be applied to those cases where the deed is void for reasons *dehors* the instrument. We do not, however, feel at liberty to assume that the law is otherwise than as it has been declared by the supreme court. We therefore do not intend to either enter on the discussion of this question or express any opinion about it, other than to say it is the law of this jurisdiction as declared by the supreme authority that a deed, even though void on its face, will make color of title as fully and as effectually as though the deed was regular on its face and void for reasons *aliunde* the instrument."

In *Walters v. Webster, supra,* the court, by Mr. Justice Gabbert, said:

"Defendant's title was based upon a tax deed. The plea of the statute of limitations which he sought to interpose related to this deed. On behalf of plaintiff it is urged that this deed is void on its face. It was issued and recorded more than seven years before plaintiff commenced his action. From this state of facts, it would constitute color of title under a proper plea of the statute of limitations and proof of the necessary facts.—*Williams*

v. Conroy, 35 Colo., 117; *DeForesta v. Gast,* 20 Colo., 307."

In *Silford v. Stratton, supra,* the last case to which our attention has been directed, the court had under consideration a treasurer's deed appearing on its face to be based on a sale to the county and an assignment of the certificate by the county clerk more than three years after its issuance, and therefore held to be void on its face. The court, by Mr. Justice Bailey, said:

"While this court has held that a deed void on its face is sufficient color to set the seven-year statute of limitation in motion, it has never held that such a deed, coupled with the payment of taxes, is *conclusive* of good faith." [Italics mine.] "So that it was competent for the defendant in this case, as was done, to introduce affirmative proof to establish the fact that the plaintiff did not act in good faith in the transaction."

Many other authorities from our own courts of last review might be cited, but are unnecessary. I have quoted somewhat at length the language of certain of the decisions for the purpose of showing that a tax deed, void on its face or for reasons *aliunde,* if it contains apt words of transfer, constitutes color of title, and as such is admissible in evidence, without regard to the peculiar ground which makes it void, or to the question of good faith; and, further, that such deed is also evidence of claim of title in good faith. Its character as color of title cannot be overcome by extraneous evidence, and therefore, when offered as color of title only, it must be admitted. Its effect as evidence of claim of title asserted in good faith may be attacked by anything in evidence tending to show a lack of good faith; and, on the other hand, the presumption of good faith may be supported and strengthened by any competent evidence. Mr. Justice Bailey, in *Silford v. Stratton, supra,* in saying that

the defendant may introduce affirmative proof to overcome the presumption of good faith raised by the color of title, and to establish the fact that the plaintiff did not act in good faith in the transaction, placed the burden of showing bad faith where it belongs—on the one alleging it.

The ruling of the supreme court in *Knight v. Lawrence, supra,* is that the "deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it *had no faith or confidence in it.*" Confidence in the title is there made the test of good faith in *claim of title,* and also in *Hardin v. Gouveneur,* 69 Ill., 140.

In the instant case it is contended that, upon the authority of *Dalton v. Lucas,* 63 Ill., 337, and *Bowman v. Wettig,* 38 Ill., 416, Sedgwick, having omitted to give the notice of his intention to apply for the treasurer's deed as required by law, will be presumed to have done so for some sinister purpose, and will not be permitted to avail himself of a deed procured without such notice, even under the plea of the statute of limitations. That rule, if conceded for the purpose of affecting the presumption of good faith, has no possible effect upon the admissibility of the deed as color of title.—*Hardin v. Gouveneur, supra.* Moreover, upon the question of good faith, even the cases cited do not go so far as to hold that proof of such failure to give notice is conclusive evidence of the want of good faith, or conclusive proof of a sinister purpose, so that the presumption thus raised may not be overcome by other evidence. The holding of the court in those two cases rests upon its application of the maxim that every person is presumed to be familiar with the provisions of the constitution and the statute—in other words, is presumed to know the law—and follows certain prior rulings of that court, which hold that when a deed on its face discloses the fact of its illegality, the law will

presume bad faith, because the grantee therein, knowing the law, was apprized by the deed itself when he took it that there was no authority to execute it. This holding, it has been shown, is in direct antagonism and conflict with the uniform decisions of our own supreme court upon the question of color of title given and the presumption of good faith raised by a deed void on its face; and the cases of *Bowman v. Wettig* and *Dalton v. Lucas,* upon the point here involved, to-wit, whether upon the presumption that plaintiff knew the law, he must be held guilty of bad faith in accepting a deed issued without compliance therewith, have been flatly repudiated by later decisions of the Illinois supreme court. See *Miller v. Pence,* 132 Ill., 149, 23 N. E., 1030, and *Sexson v. Barker,* 172 Ill., 361, 50 N. E., 109. In the latter case, having under consideration the seven-year statute of limitations, the court said:

"There is no doubt that the deed to the defendant from the master in chancery constituted color of title, and the only controversy between the parties is whether it was acquired in good faith. The good faith of the defendant is a question of fact, and in the absence of evidence to the contrary it will be presumed. Bad faith will not be presumed, but must be established by proof. (*McConnel v. Street,* 17 Ill., 253; *McCagg v. Heacock,* 34 *id.,* 476; *Brooks v. Bruyn,* 35 *id.,* 392; *Morrison v. Norman,* 47 *id.,* 477; *Stumpf v. Osterhage,* 111 *id.,* 82.) In order to overcome this presumption the evidence must show a *design to defraud* the person having a better title, and in this case there is an absence of evidence tending to prove that fact. * * * It is claimed that the cases of *Bowman v. Wettig,* 39 Ill., 416, and *Dalton v. Lucas,* 36 *id.,* 337, establish the doctrine that defendant was bound to know the law and to know that the verbal contract for the land could not be enforced, and that the decree for its enforcement was erroneous, and therefore he was guilty

of bad faith in so acquiring the deed. Such a doctrine would abrogate the statute and require the party claiming its benefit to establish a valid title, and in the case of *Davis v. Hall,* 92 Ill., 85, it was said that the apparent teachings of the opinion in *Bowman v. Wettig, supra,* had not been adhered to in the later cases."

And construing the case of *Dalton v. Lucas,* the court further said:

"That case involved a knowing and intentional omission by a purchaser at a tax sale to give a notice required by the statute, and thereby keep the owner in ignorance of his rights, and it has no application here."

To be logically consistent, if, upon the question of good faith, the presumption that every person knows the law, is conclusive, the same rule would apply to a tax deed which is void on its face because showing that the assignment was made by the county clerk more than three years after the issuance of certificate or that several non-contiguous tracts of land were sold *en masse* for a gross sum, and be conclusive evidence of the bad faith of the purchaser who took it, and destroy his claim under the color of title, as is sought to be applied in this case, upon the presumption that the purchaser knew the law, and, knowing it, failed to give the requisite notice, therefore his sinister purpose will be not only presumed, but conclusively established. To me, it is clear that in the last analysis, the question of good faith or sinister purpose is one of fact, to be shown by all the evidence. If the purchaser in fact knew that he was required to give notice, and yet failed to give it, the sinister purpose might well be presumed; but if, as a matter of fact, he did not know of the existence of the statute, and, because of that ignorance, failed to give the notice, his good faith in the transaction is not even thrown in doubt by such failure. The intent, or design, to defraud the person having a better title, said in *Serson v. Barker* to be necessary to overcome the

presumption of good faith, is absent. If, as said by our own court, good faith will be presumed by the taking of the deed itself, unless the facts and circumstances attending its execution showed that the party accepting it had no faith or confidence in the deed, it is plain that confidence in the title and purpose in acquiring it constitute the test of claim of title in good faith; design to defraud, lack of confidence in the title, of bad faith. I cannot give consent to the view that, as a basis for fixing the charge of *mala fides* upon a person who had not done some affirmative act enjoined by the law, the presumption that all men know the law is sufficient to overcome those other presumptions that all men act in good faith until the contrary is shown, and that a deed purports good faith; and also to overcome the further proof of good faith shown by a good and valuable consideration paid for the deed; placing the same upon record; taking actual possession of the premises conveyed and improving the same; occupancy thereof for a long period of years, and payment of taxes continuously, together with the oath of the party that when he took the deed he believed that it was valid, that as a matter of fact he was ignorant of the statutory requirement involved, and not aware of any failure upon his part to perform any duty enjoined on him by law or otherwise. If any doubt as to the good faith of such purchaser is raised by the mere failure on his part to give or cause to be given the statutory notice in question, he may rebut it by such proof as he offered and the court refused to admit.

The well-known maxims, "*Ignorantia facti excusat*," "*Ignorantia juris non excusat*," state fundamental principles which are general in their application; but, like all other general principles, have their exceptions. Ignorance of the invalidity of a deed is ignorance of a fact; but where such deed is void on its face, its invalidity is patent to everyone who knows the law, and therefore, it is con-

tended by some of the authorities, and asserted in the dissenting opinion, ignorance of its invalidity is equivalent to ignorance of law, which excuses no one; but the statute of limitations under consideration in this case was enacted for the very purpose of creating and enforcing an exception to the general rule announced by that maxim, and in effect has been so declared by the courts of this state. The same may be said as to the effect of the statute of limitations upon that other maxim, *"Nullus commodum capere potest de injuria sui propria"*—no one can take advantage of his own wrong. In law the "wrong" which estops, exists or does not exist according to whether there was an intent, purpose or design to defraud, where *mala fides* in fact must be shown to defeat a *bona fide* claim of title made through faith or confidence in the written instrument constituting color of title.

The case of *Richards v. Beggs,* 31 Colo., 186, 72 Pac., 1077, is quoted and relied on as conclusive against the admissibility of the deed in this case as color of title. As I read that case, it is not in point. There is no rule better known among lawyers or more fully recognized by the courts than that a decision in a given case is not authority beyond the facts of the case in which it is rendered. The deed was offered as paramount title. The opinion as reported in 31 Colo., 186, states that the action was in ejectment; that plaintiff's only evidence of title was a tax deed which he offered without any preliminary proof as to the assessed valuation of the land, or that the required notice of the time of redemption had been given, and that "for these reasons the deed was refused, and plaintiff *offering no further evidence,* a judgment of non-suit was entered." I think it is obvious from this statement of facts that the deed was offered as evidence of paramount title only, and that the question of color of title was not raised. But if we concede that, as claimed in argument, the opinion itself, as reported, does not disclose or indicate any limita-

tion upon the rule that the tax deed offered was inadmissible, a reference to the record of that case on file in the supreme court shows that the action was in ejectment, the defense a general denial. Under these circumstances, the statute of limitations could not be in issue, nor color of title a question. But it is further shown that the tax deed relied on was executed in May, 1900, and the suit was begun June 18, 1901, a little more than one year after the execution of the deed, and for that reason no statute of limitations could have been involved, and no question of color of title in the case; and a further inspection shows that the question of color of title or claim of title in good faith was not even mentioned in the pleadings or in the printed briefs and arguments on file; so that decision has no bearing whatever upon the question here under discussion.

In the outset, I stated that the position of the appellee, if accepted, is fraught with danger to established property rights. As hereinbefore shown, the supreme court has uniformly held for a period of twenty-nine years that a void tax deed gives color of title, and is presumptive proof of claim of title in good faith. This has become an established rule of property, and, supported by the payment of taxes for the requisite period, has become the foundation for extensive and valuable property rights, and this rule should be regarded as having all the force and effect of a statute. If it is to be changed, it should be by legislative action, for the very obvious reason that such a repealing statute could not be retrospective in its operation nor retroactive in effect; while, on the other hand, if repealed by a judicial act, it is both retrospective and retroactive, because it holds that the law as heretofore understood and declared has never been the law. It was well said in *Sexson v. Barker*, that such a decision would abrogate the statute of limitations itself. It would affect every title dependent for its validity upon the stat-

ute of limitations, if acquired within the prescriptive period of twenty years, unless, having been settled by some judicial proceeding, the title has become *res judicata.* Moreover, in the instant case we are met in the outset with a showing that the original patentee, who was made the defendant in this case, evaded the payment of taxes, with which governmental functions are carried on, for a period of eleven or more years; that when made a party defendant to this case he made no appearance; that Jackson, who did defend, secured a quitclaim deed from the patentee for what is alleged to be a nominal consideration only, and for speculative purposes, long after the suit was instituted; that he bought a lawsuit with full knowledge of its existence; and there is no equitable reason to justify the raising of doubtful presumptions against the plaintiff who has carried the burdens of taxation, and in favor of such a defendant.

The tax deed offered as color of title should have been admitted, as also the evidence offered as to possession and payment of taxes, together with other evidence offered on the question of good faith; and for error in refusing to admit the same, the judgment should be reversed.

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ACCOUNT STATED.

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Extension—When Mortgagee Must Assume Possession.—Where a chattel mortgage is extended by proceeding in conformity with the statute, the mortgagee has, at the expiration of the period of extension, the same rights in respect to foreclosure as at the original maturity of the debt, including a reasonable time in which to take possession of the chattels.

The mortgagee residing at a great distance from the place where the mortgaged animals were unlawfully detained, demanded possession thereof only four days after the lapse of the period of extension. Held in time.—*Ellison v. Tuckerman*, 322.

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Parties.—Mills' Code, sec. 255, Rev. Code, sec. 274, applies only to a plaintiff in possession.—*Eagan v. Mahoney*, 285.

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Lands were conveyed upon trust to dispose thereof and distribute the proceeds between the trustee and the plaintiffs. The trustee refusing to execute the trust, the other beneficiaries therein may, without joining him, have an action to set aside a tax title acquired by a stranger; and this without calling upon the trustee to move in the premises.—*Id.*

The holder of a promissory note secured by a deed of trust of lands may sue to remove a cloud upon the title to the land.—*Empire Co. v. Battelle*, 375.

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Supreme Court—Application for Injunction Renewed.—Where an appeal is prosecuted from a decree dismissing an equity cause in which an injunction was prayed, an application for the injunction, renewed in the supreme court, is not within the provision of sec. 3 of art. VI of the constitution.—*Del Monte Co. v. Chaffee County*, 340.

Retrospective Statute.—A statute providing that "any chattel mortgage * * * which has been duly admitted to record * * * may be extended" by filing in the office where the mortgage is of record a sworn statement of the mortgagee, showing the amount remaining due, and consenting to such extension (Rev. Stat., sec. 520) applies to mortgages already of record, as well as those subsequently executed.—*Ellison v. Tuckerman*, 322.

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Offer and Acceptance.—The acceptance by one party of the previous offer of another must, to be effectual, be unequivocal and unconditional, and must be made before the offer is withdrawn.—*Baum v. Concord Co.*, 397.

Rescission.—Purchaser of live stock assumes possession and ships the animals to market in another state, consigned to brokers of his own selection. The animals being offered at this market, one having no apparent authority in the premises raises a false question as to the title, not disturbing the possession, and the brokers sell them in the open market. An attempted rescission of the sale by the purchaser for the pretended defect in the title is without effect. He is liable to the seller for the contract price.—*Hale v. Cochrane*, 528.

Rescission by New Contract.—The execution and acceptance of a contract which renders impossible the performance of a former contract, is, presumptively, a substitution for and rescission thereof. This is the general rule even in the absence of full performance of the second

contract. If the second contract is fully performed, the presumption becomes conclusive.—*McKay v. Fleming*, 380.

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The defendant being the owner of a section of land, subscribed a writing describing it, giving the acreage, and containing the words, "Terms of sale, one-half cash, balance one and two years. Lowest amount to bind the bargain, $500," agreeing further to furnish an abstract of title, and make a warranty deed, etc. These provisions were followed by authority to the plaintiffs to sell the land, fixing the commission, and a statement that plaintiffs would "use their best efforts, at their own expense, to dispose of said land." The paper was not signed by plaintiffs. *Held* in the nature of an employment, rather than a contract of sale.—*Baum v. Concord Co.*, 397.

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Measure of Proof Required to Establish, is the same as required to establish negligence of the defendant.—*Great Western Co. v. Drorbaugh*, 185.

Action for an injury attributed to negligence in the operation of defendant's locomotive in switching. Defense, contributory negligence. The evidence examined, and *held* that the question was properly left to the jury.—*Colorado Midland Co. v. Edwards*, 350.

To constitute a defense to an action for a tort the contributory negligence of plaintiff must appear to have been a contributing cause of the injury. Defendant's sheep were found at large upon the range, without a shepherd. Plaintiff's herdsmen collected them and drove them to plaintiff's corral, where they communicated scab to the flock of plaintiff. This conduct of the herdsmen was alleged as contributory negligence. But neither plaintiff nor his employes knew of the diseased condition of defendant's sheep, and it appeared that the diseased animals had, by defendant's negligence, before being so taken to plaintiff's corral, exposed plaintiff's flock to the disease. *Held*, therefore, that the defense was not established.—*Mesa de Mayo Co. v. Hoyt*, 279.

Intoxication.

See MASTER AND SERVANT.

CONVEYANCES.

Construed.—Certain lands situate in Logan county were in question. They were granted to the Union Pacific *Railway* Company by letters patent Feb. 26th, A. D. 1897. The action being an equitable one to re-

move a cloud upon the title, the defendant relied upon a decree against the Union Pacific *Railway* Company quieting title thereto; and, to show title in that company, he produced a deed executed to the Union Pacific *Railroad* Company by a master in chancery under the foreclosure of a sinking fund mortgage, describing the lands conveyed as "all the lands in parcel two, as in said decree defined situate, etc., and not heretofore sold and conveyed by the Union Pacific *Railroad* Company * * * and not released by the trustee of said sinking fund mortgage." What lands were included in "parcel two" was not shown, and it appeared that, in fact, years prior to the master's deed, the Union Pacific *Railway* Company had conveyed the land in question to the ancestor of plaintiff, and the trustee of the mortgage had united therein, releasing the mortgage. *Held* that the master's deed, by its express terms, excluded the lands in controversy.—*Brackett v. McClure*, 524.

Copy of Record—Preliminary Proof to Admit.—A deed conveyed lands upon trust that the grantee should dispose thereof, and distribute the proceeds between himself and others named. In an action by the other beneficiaries against a stranger to remove a cloud upon the title, the trustee, being also a defendant, gave a deposition in which he testified to the loss of the deed. *Held* sufficient to admit a copy of the record of the deed under Rev. Stat., sec. 695.—*Eagan v. Mahoney*, 285.

Unrecorded—Effect.—One holding paramount title by a conveyance not recorded is not affected by a decree given in a cause to which he was not party, quieting title in another, under a treasurer's deed. The plaintiff, in whom title is so quieted, is not a "subsequent bona fide purchaser or encumbrancer," within the meaning of the recording act (Rev. Stat., sec. 694), nor is he in position to avail himself of the provisions of the code relating to the notice of suit pending (Code, sec. 38), because his title is not derived from the same source.—*Carroll v. Kit Carson Co.*, 217.

The statute prescribing the effect of an unrecorded conveyance of land, and that providing for a notice of suit pending, are not to be so construed as to include persons not specified. The phrase, "purchaser or encumbrancer," in each statute applies only to those claiming from the same source of title with the grantor in the unrecorded conveyance, or from the same source of title as the plaintiff in the cause in which the notice is filed.—*Id.*, 217.

One claiming lands under a tax title, and a decree quieting the title against a former owner who had previously conveyed the lands by deed not of record, is not a bona fide purchaser within Revised Statutes, sec. 694.—*Brackett v. McClure*, 524.

CORPORATIONS.

Duty to Shareholders.

See IRRIGATION.

Stockholder Dealing With.—A stockholder may, acting in good faith, deal with the corporation in respect to its property or liabilities as may any stranger.—*Meyer v. Wright*, 53.

Irregular Corporate Action—Ratification.—One of the promoters of a corporation sells shares therein upon representation that the corporation is the owner of certain lands. In fact, a large sum of money is due on account of the purchase of the same land, and this is later secured by mortgage. Pending an action to foreclose the mortgage the stockholders, at a meeting regularly called, vote to accept the promissory note of the promoter for the amount of the mortgage debt, "in liquidation" thereof. *Held* a ratification of the transaction resulting in the mortgage and all corporate irregularities therein.—*Firestone Co. v. McKissick*, 294.

Mining, Etc., Co.—Power to Encumber Mines or Plant.—Sec. 865 of the Revised Statutes is intended for the protection of the stockholders of the corporation only. The corporation itself will not be heard to dispute the validity of a mortgage of its mines or plant, otherwise valid, upon the ground that it was executed without the approval of the shareholders.—*Firestone Co. v. McKissick*, 294.

And a mortgage executed by coal mining company, of land not shown to contain coal, and upon which no part of the machinery or plant of the company is located, so that the power of the corporation to carry on its mining is in no manner interfered with, is not within the statute.—*Id.*

COUNTY COURT.

Jurisdiction.—Where, in an action in the county court, the allegations of the complaint as to the value in controversy conform to the statute (Rev. Stat., sec. 1527), the jurisdiction of that court is not open to question upon appeal, unless something affirmatively appears in the record to divest the jurisdiction rightfully acquired.—*Empire Co. v. Millet*, 464.

DAMAGES.

Exemplary.—Where the master exercises reasonable care in selecting and employing the servant he is not charged with punitive damages for the torts or neglects of the servant, not authorized or afterwards ratified by him.—*Great Western Co. v. Drorbaugh*, 188.

Mental Suffering—When an Element of Damage.—The cases in which substantial damage is awarded for mental suffering, not attended

DAMAGES—Continued

by injury to the person, examined, and *held* that mental suffering, the result of the mere passive breach of a contract, of one not engaged in a business of a *quasi*-public nature, the breach not being attended by any wanton, wilful or oppressive conduct, will not sustain an award of substantial damages.

That nominal damages may be awarded. *Bleecker v. Colorado Etc. Co.*, 50 Colo., 140, distinguished.—*Hall v. Jackson*, 225.

Evidence as to.—An action for injury to lands by trampling the same with cattle, exterminating the alfalfa with which the land was seeded. A witness estimated the permanent damage at $10 per acre, because he could have gotten $10 per acre for it, if seeded down. There was no evidence of the rental value of the land, if unseeded, in the year of the trespass, nor that, unseeded, it had no value. The evidence was held insufficient to sustain an award of $10 per acre.

The evidence as to an award of damages, occasioned by the necessity to "re-seed" the land, *held* too indefinite to support the award made. —*Traver v. Dodd*, 273.

To Lands by Seepage—The Measure of, is the difference in value of the land immediately before the injury occurs and immediately after its culmination.—*Consolidated Lower Boulder Co. v. Alaux*, 377.

Mitigation of Damages.—In an action for trespass to lands, and resulting injury to the growing crops, the defendant is entitled to show negligence of the tenant contributing to the injury.—*Traver v. Dodd*, 273.

If, in an action for an injury to lands, the defendant would attribute the depreciation in value to causes other than his misconduct he must give evidence of such other causes sufficiently clear and definite to warrant a just inference as to the effect thereof.—*Consolidated Lower Boulder Co. v. Alaux*, 377.

DEED OF TRUST.

Trustee's Deed—Recitals. are *prima facie* evidence of what is so recited.—*Empire Co. v. Howell*, 67.

Recitals of trustee's deed are, where the deed of trust so provides, *prima facie* evidence of the facts recited, *e. g.*, the deed being executed by a substitute trustee, the recitations thereof that one W. was at a date named the holder of the promissory note mentioned in the deed of trust, that the original trustee was a non-resident of the state, and therefore unable to act, and that W. had appointed as substitute trustee the grantor in the deed, were held *prima facie* evidence of the facts so recited.—*Scott v. Lambert*, 260.

DEED OF TRUST—Continued

In ejectment plaintiff gave in evidence a deed of trust of the land in controversy for securing the payment of a promissory note mentioned therein. He then offered a trustee's deed executed by the trustee named in such deed of trust reciting a deed of trust between the same parties and bearing the same date with that offered in evidence for the security of the same person, but recorded on a different date, and at a different place. It was shown that there was, in fact, a deed of trust corresponding as to date and place of record with that recited in the trustee's deed purporting to be executed by the same grantor in the deed of trust offered by plaintiff, to the same trustee, and to convey the same land, but securing a different sum of money, to a different creditor. *Held* that, *prima facie*, the trustee's deed offered by plaintiff was not executed pursuant to the deed of trust upon which he relied, and, there being no evidence to explain these discrepancies, that plaintiff showed no title.—*Empire Co. v. Howell*, 417.

DEMAND.

Where Necessary.—The owner of lands occupied by another under a false claim of right is not under any requirement to make demand for rents, as a condition precedent to an action for use and occupation.—*Nathan v. Crouse*, 32.

DISEASE.

Communicating.—A flock master who, knowing that his sheep are infected with scab, permits them to range and mingle with the healthy flock of another, without communicating to him their diseased condition, is liable in damages if the disease is communicated to the healthy flock.—*Mesa de Mayo Co. v. Hoyt*, 279.

DISTRICT COURT.

Jurisdiction.—A bill against the heirs, devisees and executor of a decedent to establish a trust in lands purchased by such decedent with moneys of the plaintiff in decedent's hands, as plaintiff's trustee, lies in the district court. The provisions of sec. 7206 of the Revised Statutes are without effect to exclude the jurisdiction.—*Berry v. French*, 519.

DURESS.

What is Not.—Defendant agreed to convey lands to plaintiff. In fact, he owned but an undivided half of the land, and plaintiff, in order to acquire the property, paid to defendant's co-tenant a price largely in excess of that stipulated to be paid to defendant. Plaintiff afterwards brought an action against defendant for this excess, claiming that by reason of defendant's failure he was compelled to pay the excess in order

DURESS—Continued

to obtain the property to which he was entitled. This contention was repelled, the court holding that plaintiff, being at full liberty to stand upon his rights under the original contract, was under no compulsion.—*McKay v. Fleming*, 380.

EJECTMENT.

Complaint—Plaintiff's Title.—The complaint in an action for the recovery of lands must comply with the provisions of the code (Mills' Code, sec. 267; Rev. Code, sec. 286). A complaint averring the filing by plaintiff with the state engineer, on a day named, of a preliminary map and description of a reservoir site, upon particular lands described; the commencement of work thereon within six days thereafter; the diligent prosecution thereof, and continuous peaceable possession until ousted; that plaintiffs had "endeavored to find the owners of the fee in such lands, for the purpose of purchasing or condemning the same," and that "the estate of plaintiff * * * consists of a lawful filing for a reservoir site, under the law, with the right by purchase or condemnation proceedings to acquire the said land from the owners," shows no estate whatever in plaintiff, and is not a compliance with the statute.

Semble that the statute of Forcible Entry might be successfully invoked.—*Tebow v. Teller*, 239.

Defendant's Possession.—Under sec. 295 of the code, where the defendant asserts title the plaintiff is not required to prove the defendant's possession.—*Empire Co. v. Millett*, 464.

Plaintiff Recovers Upon the Strength of His Own Title.—Whatever may be the condition of defendant's title, the plaintiff not showing any title in himself has no right to annoy him. And the defendant is at liberty to make objection to any defect in the plaintiff's chain of title, even though he pleads a title derived from a different source, and a title which appears upon its face to be an empty one.—*Empire Co. v. Howell*, 417.

Defendant's Objections to Plaintiff's Title.—The defendant is at liberty to make objection to any defect in plaintiff's title, even though he pleads a title derived from a different source, and a title which appears upon its face to be an empty one.—*Empire Co. v. Howell*, 417.

EQUITY.

Remedy at Law.—It is important that the powers of the court of equity should be confined to cases where the law affords no speedy and adequate remedy. Equity will not entertain an action by a society against a bank to compel payment of the society's check and restrain it from recognizing certain seceding members. There being money in the

EQUITY—Continued

bank to the credit of the society, an action at law for the dishonor of the check affords an ample remedy.—*Central Savings Bank v. Carpenters & Joiners*, 440.

Equitable Conversion—The Doctrine of, is an invention of the equity courts for effectuating the intentions of the donor of a trust, not to defeat them. It extends only to those who claim from the same source of title as the trustee, as beneficiary, or through the same instrument, directly from or under the author thereof. It cannot be invoked by one who claims paramount title from another source, which, if sustained, extinguishes the trust estate.—*Eagan v. Mahoney*, 285.

Reformation of Writing.—A mistake in the phraseology of a written contract by which it is made to depart from the intent of the parties may be reformed, and the contract as so reformed enforced, in the same action.

The evidence held amply sufficient to establish the mistake charged. —*Park v. McKee*, 11.

Mistake of One Party.—Equity may reform a writing where the mistake is mutual, or where the mistake is by one party, and is accompanied by fraud or inequitable conduct by the other.—*Johnson v. First National Bank*, 23.

Laches.—That the claims asserted by a complaint may appear stale, and the plaintiff's conduct extraordinary, ought not, ordinarily, to be determined upon general demurrer.—*Berry v. French*, 519.

Decree—Full Relief.—Action to reform a banker's certificate of deposit issued, by mistake of a clerk, for an excessive amount, and to restrain its negotiation. After service of process upon him the defendant negotiated the certificate to an innocent third party, receiving the amount named therein. A decree required him to repay to the bank what he had received in excess of his deposit, and committing him until payment, was affirmed.—*Johnson v. First National Bank*, 23.

ESTOPPEL.

Pleading—By Conduct—Must Be Pleaded, in order to be effective as a defense.—*Mesa County Bank v. Berry*, 487.

EVIDENCE.

Judicial Notice, taken, that one riding a bicycle at three miles an hour has complete control of the wheel; that it can be stopped at will, or turned to right or left, and the rider dismount without danger of a fall, and that one so riding may pass over an ordinary depression of three or four inches in depth, and eighteen inches in length, without material disturbance of wheel or rider.—*Koch v. Denver*, 406.

EVIDENCE—Continued

Presumptions.—Proof of title to land raises a presumption of possession.—*Gurnett v. Henry*, 272.

Possession of Lands, is *prima facie* evidence of title in the occupant.—*Eagan v. Mahoney*, 285.

Competency.—The certificate of the county treasurer as to when a notice of a tax sale was published is not competent evidence of the date of such publication.—*Pelton v. Muntzing*, 1.

Where contestants of a will alleged that the testator was of unsound mind and had been unable to transact business for years prior to the execution of the testament, letters of the deceased written during that period are admissible upon such issue.—*Burnham v. Grant*, 131.

Self-serving letters of the contestant are not admissible in his behalf. (Rev. Stat., sec. 7267.)—*Id.*

Admission in Pleading, that a certain action was instituted, and decree given therein, but alleging that the defendant named in the action was dead before its institution, is not an admission of the jurisdiction of the court in which the decree was given.—*Riley v. Lemieux*, 184.

In an action to quiet title the admission of the execution of a treasurer's deed, but with an allegation of its invalidity, does not relieve the party relying upon the deed of the necessity to produce it.—*Empire Co. v. Patterson*, 395.

Admissions of Agent, against the interest of the principal, made subsequent to the transaction, are not, in general, admissible to establish the fact admitted.—*Fisher v. McPhee & McGinnity Co.*, 420.

Otherwise, where the admission is used to contradict the testimony of the agent.—*Id.*

Admissions—Former Testimony of Party.—The testimony of one of several joint plaintiffs, given in the first trial of a cause, may be read for the defendant at the second trial as an admission against interest, even though the party so testifying is present in court at such second trial.

Sec. 7284 of the Revised Statutes has not the effect to deprive a party of the advantage of prior admissions by an adversary.—*Grand Lodge v. Taylor*, 106.

An Admission Qualified by a Condition, must be accepted subject to such condition.—*Riley v. Lemieux*, 184.

Public Documents.—A tax deed valid upon its face is, under Mills' Stat., sec. 3902 (Rev. Stat., sec. 5730), *prima facie* evidence that the sale was advertised according to law. Whoever asserts the contrary has the burden of proof.—*Pelton v. Muntzing*, 1.

EVIDENCE—Continued

Parol Admissible.—Parol evidence is admissible to show the circumstances attending the execution of a writing.—*Wellington Co. v. Gilbert*, 118.

A Resulting Trust in Lands, may be established by oral testimony.—*Berry v. French*, 519.

Opinions.—The question being asked as to the existence of a partnership between the defendants, it is error to permit the plaintiff to state that the defendants were partners. Such a statement is merely the conclusion of the witness.—*Kent v. Cobb*, 264.

Experts.—Experts' testimony is not entitled to greater weight than that of non-professional witnesses. The attention of the jury should not be specially called to it, either in the way of commendation or condemnation.—*Burnham v. Grant*, 131.

The value of certain lands being in question, witnesses were offered, some of whom, at the time when the value is in question, and for several years before, resided and owned property in the vicinity, knew the lands in question, and knew of sales made of other properties, and the prices obtained; and one of whom had been a deputy assessor, and had bought and sold land in the same vicinity for twenty years. They were held competent to speak to the value.—*Consolidated Lower Boulder Co. v. Alaux*, 377.

Survivorship.—In an action upon the certificate of a fraternal society, by the heirs of the deceased beneficiary, it appearing that both the beneficiary and the certificated member came to their death upon the same occasion, the evidence examined and held that the probabilities are that the beneficiary was the survivor.—*Women of Woodcraft v. Rausch*, 304.

Conversation by Telephone.—A party to the action may testify to a conversation with his adversary, by telephone, relating to the matter in issue; and, as showing acquaintance with his voice, he may testify to previous like conversations had with such adversary.

A bystander may testify to the conversation so far as he heard it.—*Kent v. Cobb*, 264.

Affirmative and Negative Testimony.—The question being whether the bell of the locomotive was ringing before and at the time of an accident, the affirmative testimony of witnesses that it *was* ringing is not necessarily to be preferred to that of others, who, with equal opportunities, did not hear it. The question is for the jury.—*Colorado Midland Co. v. Edwards*, 350.

Examination of Witness—Hypothetical Question.—A hypothetical

EVIDENCE—Continued

question assuming facts not established by evidence, and which no evidence tends to establish, must be excluded.—*Burnham v. Grant*, 131.

Measure of Proof Required.—Whoever sues upon a *quantum meruit* for services rendered must establish the employment, the rendition of the service, and the reasonable value thereof.

The evidence examined and held insufficient upon all points.—*Sankey v. Cramer*, 16.

EXECUTIONS.

Improvidently Issued—Or Upon Void or Satisfied Judgment—Remedy.—An execution issued upon a void judgment or one which has been satisfied, in whole or in part, or an execution improvidently issued for any reason, may be quashed upon motion in the court from which it issues.—*Irwin v. Beggs*, 158.

Injunction.—But where complicated questions of law or fact, such as can be properly tried only upon appropriate pleadings, are involved, equitable relief may be obtained by an original suit, and the execution may be enjoined.

Irwin recovered judgment against Beggs in the county court, levied execution upon certain lands, and purchased the same in partial satisfaction of the judgment. Third parties afterwards contested his title and prevailed in such contest. Beggs was not party to the latter proceeding. Irwin afterwards took execution for the full amount of his judgment and levied upon personal property of Beggs. Beggs, without any application to the county court, brought his bill in the district court to restrain proceedings under the latter execution. The record presented the following questions: (1) Whether Irwin's purchase of the lands under the first execution estopped him to proceed for the full amount of his judgment; (2) whether, by the judgments recovered by third persons against Irwin, quieting the title, and so obliterating his purchase on execution, Beggs was estopped to show that at the time of Irwin's levy, he (Beggs) had in fact an interest in the land, which therefore passed to Irwin; and (3) whether Irwin, as a condition precedent to the relief demanded by Beggs, was not entitled to a decree vacating his purchase of the land on the first execution. *Held* that these questions could not be as fully and fairly tried on motion, as by suit in equity; that Beggs was entitled to maintain his action, and that an injunction to restrain proceedings under the second execution, was proper and necessary.—*Id.*

Sale—Caveat Emptor.—Execution creditor, knowing that the debtor holds a certain interest in specified lands, assuming that the debtor has

EXECUTIONS—Continued

in fact the entire estate levies thereon and becomes the purchaser. In the absence of fraud or misrepresentation on the part of the debtor, he is without remedy, if in fact his purchase proves fruitless. The maxim *caveat emptor* applies.—*Irwin v. Beggs*, 158.

FIXTURES.

Part of the Realty.—A boiler erected in a mill for the reduction of gold bearing ores, by a lessee thereof, held in place by stone casings laid up in mortar and cement, shafting attached by bolts to the frame of the mill, and tables resting upon a foundation and connected therewith by bolts, and which are necessary to the successful operation of the plant, or some parts thereof, and were put in place with the intention to make them a permanent accession to the freehold, are part of the realty.—*Puzzle Co. v. Morse Co.*, 74.

FRATERNAL SOCIETIES.

Collection of Membership Dues.—Fraternal societies make their own laws and regulations. There is no provision of law for the collection of the dues of members by legal proceedings.

It is essential that they enforce such a discipline among their members that the subordinate bodies of which the order is composed may promptly collect their dues.—*Grand Lodge v. Taylor*, 106.

Consolidation—Rights of Members.—Where two fraternal benefit societies of the same general purpose consolidate, adopting for the consolidated body the name and charter rights of one of them, the consolidated body agreeing to account for the funds it will receive from the original societies, with future receipts from the membership of each, "according to the respective contracts of the members," and "for the equitable and complete protection of the memberships" of each of the orders, and an estimate or accounting has been had for the purpose of the consolidation, and the consolidated order issues to the members of one of the original societies a certificate or rider to his policy, agreeing to assume liabilities under the contracts held by them, it may well be inferred, without proof upon the question, that whatever was necessary to be done on the part of the original society to consummate the consolidation was done, and that its funds and securities were received by the consolidated body.—*Grand Lodge v. Cliff*, 480.

Surrender Values.—Where, in such case, the consolidated body recognizes the liability of its funds for death losses, under certificates issued by one of the original societies, the same funds are subject to the payment of surrender values if there is no stipulation to the contrary in the agreement of consolidation.—*Id.*

FRATERNAL SOCIETIES—Continued

Construction of Certificate.—The certificate of a fraternal benevolent society is construed by the same rules of interpretation which control the construction of other contracts.—*Women of Woodcraft v. Rausch*, 304.

Validity of Conditions.—A forfeiture of the contemplated benefits, declared by the explicit provisions of the certificate, will be enforced, if not opposed to any rule of public policy.—*Women of Woodcraft v. Rausch*, 304.

A condition that "if the member be murdered by the beneficiary, or the beneficiary cause the death of the member, directly or indirectly, intentionally or accidentally," the benefits otherwise payable shall revert, is a valid condition.—*Id.*, 304.

The member was killed by the beneficiary while the latter was insane. Held, there could be no recovery.—*Id.*, 304.

Conditions Not Read by the Member.—That the conditions of the certificate are not specifically called to the attention of the member is immaterial.—*Id.*, 304.

Right of Member to Resort to the Courts.—Where, in the constitution of a benefit society, and the statute controlling it, there is nothing requiring a member to present his claim and exhaust all remedies within the order, before applying to the courts a member whose right is denied may at once institute his action.—*Grand Fraternity v. Cliff*, 480.

GIFT.

Negotiable Paper—Endorsement, is not necessary, as matter of law, to sustain a gift of negotiable paper, either *inter vivos* or *causa mortis*. The absence of an endorsement is matter of evidence to be considered with more suspicion in the case of an alleged gift *inter vivos* than in one *causa mortis*.—*Fagan v. Troutman*, 473.

IMPRISONMENT FOR DEBT.

Action to reform a banker's certificate of deposit issued, by mistake of a clerk, for an excessive amount, and to restrain its negotiation. After service of process upon him the defendant negotiated the certificate to an innocent third party, receiving the amount named therein. A decree required him to repay to the bank what he had received in excess of his deposit, and committing him until payment, was affirmed.—*Johnson v. First National Bank*, 23.

INJUNCTION.

When Allowed.—Equity will not award an injunction to enforce a right, or prevent a wrong, in the abstract, without proof of a well-

INJUNCTION—Continued

grounded apprehension of immediate or future injury.—*Sorenson v. Norrell*, 470.

Allowed to restrain a trespass upon lands.—*Traver v. Dodd*, 273.

Irregular Proceeding to Open Public Road.—Where an attempt is made to open a public road through private property, without substantial compliance with the requirements of the statute, without affording the property owner opportunity to be heard, and without compensation made or offered, for the injury occasioned, an injunction will be awarded.—*Del Monte Co. v. Chaffee County*, 340.

Irreparable Injury, does not necessarily import an injury of such character as to be beyond the possibility of compensation in damages, or even that it must be very great. That no damage in fact can be proven often furnishes the very best reason why equity should interfere, *e. g.*, where the injury complained of is a continuous one.—*Del Monte Co. v. Chaffee County*, 340.

Obstruction of Private Way.—An injunction allowed to restrain the opening of a public road, without compliance with the requirements of the statute, where the effect was to obstruct a private lane by which the live stock of complainant had long been wont to go to the watering place.—*Id.*

Execution—Improvidently Issued—Or Upon Void or Satisfied Judgment.—An execution issued upon a void judgment or one which has been satisfied, in whole or in part, or an execution improvidently issued for any reason, may be quashed upon motion in the court from which it issues. But where complicated questions of law or fact, such as can be properly tried only upon appropriate pleadings, are involved, equitable relief may be obtained by an original suit, and the execution may be enjoined.—*Irwin v. Beggs*, 158.

INSTRUCTIONS.

Duty to Pray.—Where in an action for negligence plaintiff gives no evidence of certain particulars of negligence charged in the complaint it is the duty of defendant's counsel to apply to the court for an instruction withdrawing these matters from the attention of the jury; and it is the duty of the court to give such instruction.—*Colorado Midland Co. v. Edwards*, 350.

As to an Issue Not Proven.—A party is not entitled to an instruction upon an issue made by the pleadings, but sustained by no evidence. —*Finding v. Gitzen*, 38.

Assuming Facts, which are for the jury are properly refused; or those given in other words; or those which mistake the law.—*Finding v. Gitzen*, 38.

INSTRUCTIONS—Continued

Objections to.—In an action for injury to lands occasioned by seepage from defendant's ditch, the defendant objected to an instruction warranted by the evidence, and assigned error thereon, suggesting other causes appearing in the evidence to which the depreciation might, in part, be attributed, and which were not adverted to in the instruction. But defendant failed in the court below to pray any instruction calling attention to the special and different cause of depreciation so relied upon. *Held* that by its default in this respect it was not in position to challenge the correctness of the charge given.—*Consolidated Lower Boulder Co. v. Alaux*, 377.

Exceptions to.—Error in an instruction, to which no exception was saved, is without influence upon an appeal.—*Kent v. Cobb*, 264.

Exceptions to instructions must be taken before the jury retires.—*Colorado Midland Co. v. Edwards*, 350.

INTEREST.

When Allowed.—Executory sale of a stock of merchandise and a deposit made by the purchaser. The latter alleging fraud upon the part of the seller abandoned the sale and sued for his deposit. He was allowed interest from the date of the sale.—*McCrea v. Ford*, 506.

IRRIGATION.

Irrigating Company—Duty to Stockholders.—A corporation organized for the purpose of supplying water to its stockholders by means of reservoirs and ditches is charged by the law with the duties of reasonable care and diligence in procuring and storing the water, keeping its works in repair, and making ratable distribution of the water. When the land of a particular stockholder is so situated that it can be irrigated from certain reservoirs only, it is the duty of the corporation, if by reasonable care it is practicable, without prejudice to other stockholders, to retain in such reservoirs water sufficient to irrigate the lands of such stockholder; and if without excuse it fails in this duty, it is liable to the stockholder for any injury which may result.

The defendant owned three reservoirs. From only the upper two could plaintiff's lands be irrigated. Early in the season of irrigation, according to evidence given for the plaintiff, the water was drawn from the two upper reservoirs into the third, below plaintiff's land, and there remained stored through the entire season, while plaintiff's crops were perishing. Meanwhile, water was not distributed to the shareholders according to their respective holdings, but each received according to his needs, and it appeared that those cultivating the lands of the president of the corporation had an abundance. Held, that under these cir-

IRRIGATION—Continued

cumstances plaintiff was not to be strictly limited to his ratable share, and that the jury were warranted in a verdict for plaintiff.—*Mountain Co. v. Lindekugel*, 100.

Seepage—Liability of Owner of Ditch.—One operating an irrigating ditch is liable to the owner of neighboring lands injured by seepage from the ditch attributable to negligence in the management thereof.

And, where the one operating the ditch is entitled to convey the water therein only by a conveyance from the injured party which reserves to the grantor all rights of action for "damages occasioned by seepage," negligence need not be shown.—*Id.*

JUDGE.

Conduct of, on Trial.
See TRIALS.

JUDGMENT.

Jurisdiction of the Court, may be questioned at any time for want of necessary averment, or evident lack of jurisdiction *ab initio*.—*Empire Co. v. Millett*, 464.

Collateral Attack.—An insufficient and void levy of an attachment upon lands is made and the plaintiff in the action recovers judgment. One not a party to that action institutes a suit in equity to set aside, as a cloud upon his title, such void and insufficient levy. The latter action is not an attack upon the judgment in the former.—*Weiss v. Ahrens*, 531.

Record as Evidence.—Where a judgment is relied upon as an estoppel, or as an adjudication of facts, not only the judgment entry, but the judgment roll, must be produced.—*Empire Co. v. Lumelius*, 49; *Empire Co. v. Patterson*, 395.

The record of a decree quieting the title to lands is not admissible as evidence of the title unless accompanied by the antecedent proceedings leading up to the decree.—*Empire Co. v. Battelle*, 375; *Nisbet v. Cristler*, 514.

The record of the judgment is evidence only against the parties to the action.—*Carroll v. The Kit Carson Co.*, 217.

Against One Not in Being at the institution of the action is void.—*Riley v. Lemieux*, 184.

Who Concluded.—One is not concluded by a judgment in a cause to which he is not a party.—*Irwin v. Beggs*, 158.

A decree quieting title to lands is without effect as to those who were not parties to the cause, nor claiming under those named as defendants therein.—*Brackett v. McClure*, 524.

JUDGMENT—Continued

An order of the district court appointing a receiver, and directing him to assume possession of certain live stock is without effect as against a mortgagee thereof who is not a party to the proceedings.—*Ellison v. Tuckerman*, 322.

Misnomer of Defendant.—Where, in judicial proceedings, the defendant is personally served or appears, the omission of, or a variance in, the middle name or initial will be disregarded. But a decree quieting the title to lands, given by default, upon publication of the summons all the proceedings describing the defendant as A. L. Deleplane is without effect as to Albert S. Deleplane.—*Gibson v. Foster*, 434.

JURY.

Trial by—Equity Causes.—Parties to an equity cause are not entitled as of right to a jury. If a jury is called the verdict is merely advisory.—*Johnson v. First National Bank*, 23.

Rule of Court Denying.—A rule of court requiring that every notice to set a cause for trial shall state whether a trial to the court or to a jury is demanded, is not to be so construed and applied as to deny a trial by jury where the party is entitled to it. Defendant in an action at law, who, being served with a notice, under the rule, not indicating whether the case is for a jury or not, must be allowed a trial by jury, if he applies for it seasonably. Even delay in the application occasioning inconvenience to the other party, or to the court, is not sufficient to warrant a denial of the constitutional right to a jury. The application should be granted, terms being imposed if the ends of justice require.—*Peeps Fixture Co. v. Gove*, 149.

LANDLORD AND TENANT.

Lease Construed.—A lease of farm lands provided that the landlord should furnish three horses, and that the tenant should "feed all teams at his own expense."

Held that the tenant was not entitled to charge the landlord for the care and feed of an animal actually worked and used on the premises, no matter how worthless.—*Wilmore v. Kalberer*, 209.

Option to Tenant to Purchase.—Lessee of lands, with an option of purchase, tenders payment of the stipulated purchase money, with a condition as to the terms of the deed not warranted by the provisions of the option. He is not entitled to retain possession beyond the period of his lease.—*Castrilla v. Velotta*, 95.

Right of Action for a Trespass to the Tenement.—Damages to growing crops belong to the tenant, and are not recoverable by the landlord —*Traver v. Dodd*, 273.

LANDLORD AND TENANT—Continued

Use and Occupation.—The owner of lands occupied by another against his will is entitled to recover the reasonable value of such use and occupation.—*Nathan v. Crouse*, 32.

Defendant's ancestor, having conveyed certain premises to plaintiff, afterwards instituted an action to annul the conveyance, as obtained by fraud. By the final decree of the district court the conveyance was sustained. Pending this action defendant occupied the premises. She was held liable to plaintiff for the reasonable value of such occupancy.—*Id.*

LIMITATIONS.

Void Deed, does not set in motion the five years' statute of limitation. (Rev. Stat., sec. 5733.)—*Foster v. Gray*, 247; *Empire Co. v. Howell*, 417.

Nor does a tax deed where there is no recitation of notice given of the tax purchaser's intention to apply for his deed, or that the assessed valuation is such that notice is not required.—*Sheesley v. Voorhees*, 428.

Nor a tax deed not recorded.—*Scott v. Conrad*, 452.

Payment of Taxes.—A tax deed asserted as color of title was recorded April 22, 1891. Held, that the first payment of taxes to be counted, in support of a plea of the statute of limitations (Rev. Stat., sec. 4090), was that made in 1902 for the tax of 1901. The action having been commenced less than seven years subsequent to such payment, the plea of the statute was not sustained.—*Empire Co. v. Howell*, 67.

One claiming vacant lands must, in order to avail of the seven years' limitation (Rev. Stat., sec. 4090) show that seven full years intervened between the first payment of taxes and the institution of the action of the paramount owner.—*Callahan v. Reinhardt*, 199.

The seven years' statute (Rev. Stat., sec. 4090) commences its course, where a treasurer's deed is relied upon, with the recording of the deed.—*Empire Co. v. Battelle*, 375.

One claiming unoccupied lands under a treasurer's deed must, to avail himself of the statute (Rev. Stat., sec. 4090), show seven years' payment of taxes subsequent to the record of his deed, and before the commencement of an action by the owner of the paramount title.—*Johnson v. Gibson*, 392.

The statute (Rev. Stat., sec. 4090) is no bar to the action of the paramount owner instituted within seven years next succeeding the first payment of taxes under the adverse claim.—*Empire Co. v. Patterson*, 395.

Quieting Title.—No statute limits the period in which one in actual occupation of lands may sue to quiet his title.—*Lougee v. Wilson*, 90.

LIMITATIONS—Continued

The five years' statute of limitations (Rev. Stat., sec. 5733) is no bar to an action to quiet title. A void deed does not set the statute in motion.—*Callahan v. Reinhardt*, 199; *Scott v. Conrad*, 452.

The provisions of section 4073 of the Revised Statutes have no application to a bill to quiet the title to lands.—*Nisbet v. Cristler*, 514.

Cloud Upon Title.—The five-year statute of limitations (Rev. Stat., sec. 5733) is no plea to a bill to remove a cloud from title.—*Foster v. Gray*, 247; *Eagan v. Mahoney*, 285; *Empire Co. v. Battelle*, 375.

MASTER AND SERVANT.

When the Relation Exists.—The switching crew of a railway company was accustomed to operate cars and engines upon certain tracks, the property of, and within the private premises of, a mining company, but connected with those of the railroad company. The crew so employed were in the general service of the railway company, operated under its rules, were borne upon its payrolls, and the cars and engines were the property of that company. *Held* that though while so employed, the crew acted under the direction of the mining company as to where cars should be set, they were still the servants of the railroad company, and that company was liable for their neglects.—*Colorado Midland Co. v. Edwards*, 350.

Servants' Assumption of Risk.—The servant assumes all risks ordinarily and naturally incident to the service, but not those which result from the master's failure to use reasonable care in providing reasonably safe machinery and appliances, a reasonably safe place for the servant's work, other competent servants, or his failure to use reasonable care to prevent injury to the servant.—*Finding v. Gitzen*, 38.

Duty of Master to Avoid Exposing Servant to Unnecessary Perils.—One who, controlling a passenger elevator, directs the servant to clean the top of the car while in use, is under duty to exercise at least reasonable care to provide a competent and careful pilot, and to take reasonable precaution, through such pilot, to so operate the car as to avoid injury to the other servant.—*Finding v. Gitzen*, 38.

Clear notice and warning should be given of every contemplated movement of the car.—*Id.* 38.

Contributory Negligence of Servant—Intoxication, is not negligence, unless it occasions or contributes to the injury complained of.—*Finding v. Gitzen*, 38.

MAXIMS.

Falsa Demonstratio.—A contract was entered into for the purchase of a certain block of lots, in a certain townsite, describing the premises

MAXIMS—Continued

as "Block Two (2)," etc., "according to the recorded plat." No plat was then of record, and the purchaser dealt according to and upon the fact of a blueprint exhibited to him by the seller, as the true plat of such townsite. The purchaser was entitled to the premises described in the blueprint as Block 2, the phrase "according to the recorded plat" being rejected as false demonstration.—*Wellington Co. v. Gilbert*, 118.

MECHANIC'S LIENS.

Statement of Lien—Service of Copy—Contractor—Sub-Contractor.—One improving leased premises at the instance of the tenant is not a sub-contractor, and is not required to serve a copy of the statement of lien required by Rev. Stat., sec. 4033.—*Fisher v. McPhee & McGinnity Co.*, 420.

Notice to Agent.—Where the general agent of the owner, having full charge of the premises, with authority to let the same and make repairs thereon, has notice of improvements being made by the tenant, such notice charges the owner.—*Fisher v. McPhee & McGinnity Co.*, 420.

Pleadings—Burden of Proof.—One seeking to enforce a lien upon leased premises for improvements made at the instance of the tenant, alleging that the landlord had notice of the improvement, is not required to go further, and allege or prove that the landlord did not give the notice provided for by Rev. Stat., sec. 4029.

Such notice, if given, is matter of defense, to be alleged and established by the defendant.—*Fisher v. McPhee & McGinnity Co.*, 420.

Owner Failing to Give Notice That Premises Are Not Chargeable.—The statute (Rev. Stat., sec. 4029) has the effect to impose a lien upon the tenement for improvements made by the tenant when the landlord fails to give notice to the contrary within five days after he is informed of the intended improvement.—*Fisher v. McPhee & McGinnity Co.*, 420.

The evidence examined and held to warrant the finding that the owner, by her agent, was informed of the improvement as it proceeded, and failed to give the statutory notice.—*Id.*, 420.

Improvements Made by Tenant.—Unless the lease so provides, the landlord cannot be charged with the cost of an improvement made by the tenant, nor can the leased premises be subjected to a lien therefor. The tenant is not the agent of the owner within the meaning of section 1 of the statute (Rev. Stat., sec. 4025).—*Fisher v. McPhee & McGinnity Co.*, 420.

MISTAKE.

Of Law—Third Person Not Liable for Moneys Expended in Pursuing Such Mistake.—A stenographer assuming that an attorney has implied

MISTAKE—Continued

authority from his client to order the preparation of a bill of exceptions brings an action against the client for his services in the matter and suffers defeat. The attorney, not having asserted any such authority, is not responsible to the stenographer for moneys expended by him in the litigation against the client.—*Bloomfield v. Nevitt*, 91.

MUNICIPAL CORPORATIONS.

Defective Ways.—Municipal corporations are under duty to use reasonable care to maintain the public walks in reasonably safe condition.

A week of changeable weather had succeeded a considerable fall of snow—thawing by day and freezing by night. The walk upon which certain vacant lots abutted had not been cleared, and had become rough, slippery and dangerous. Plaintiff was injured by a fall attributable to these conditions. Held, it was for the jury to say whether, under the circumstances, the city had notice of the unsafe condition of the walk, whether, by reasonable effort, the city, after such notice, might have corrected the defect, and whether it was negligent in failing to do so.—*Denver v. Rhodes*, 114.

A city is not required to maintain its streets in perfect condition, but only in a condition reasonably safe for passage.

The evidence held insufficient to charge the city with neglect of its duty.—*Koch v. Denver*, 406.

NAMES.

Initials.—The middle name, or the initial thereof, is material as a distinguishing identification of the person. No presumption will be indulged that Albert S. and A. L. are the same person.—*Gibson v. Foster*, 434.

NEGLIGENCE.

Ordinary Care, depends on the circumstances of the particular case.

A traveler whose vehicle breaks down, or is stalled, upon a railway crossing is bound only to ordinary diligence to avoid injury from passing trains; and it seems that the railway company is bound only to the same degree of diligence to avoid doing him injury.

Plaintiff's wagon, heavily loaded, broke down upon a crossing of defendant's railway. While plaintiff was transferring the load to another wagon defendant's train, having taken water at a stand-pipe 1,000 feet from the crossing, proceeded at speed, without giving any signal, or keeping any lookout, crashing into and destroying the wagons as they stood upon the crossing. Defendant's servants in charge of the train knew that the crossing was constantly thronged with passing teams. It

NEGLIGENCE—Continued

was near mid-day, and the crossing was in plain view of the fireman upon the engine, almost from the moment of leaving the stand-pipe *Held* defendant was chargeable with negligence.

That the jury might have found that plaintiff was entitled to assume that the servants of defendant would see and take notice of his perilous position, and stopped the train in time to avoid doing him injury; and that he was not to be declared guilty of contributory negligence, as matter of law, in failing to signal the train.—*Great Western Co.* v. *Drorbaugh*, 188.

NEW TRIAL.

Oral Testimony at Hearing.—Whether in considering a motion for a new trial oral testimony shall be received is in the discretion of the court. (Mills' Code, sec. 217; Rev. Code, sec. 236.)—*Burnham* v. *Grant*, 131.

NOTICE.

Possession of Land.—The mere "charge" of land, not accompanied by actual occupancy, or any act of ownership, is not notice of any right in the one so in charge.—*Traver* v. *Dodd*, 273.

Notice of a Suit Pending does not affect one claiming the lands under title from a source different from that asserted by the plaintiff in the action.—*Carroll* v. *Kit Carson Co.*, 217.

PARTIES.

Pleading as to.—A complaint against three persons named, "constituting and being the board of county commissioners" of a county named, is technically insufficient.—*Del Monte Co.* v. *Chaffee County*, 340.

Defect in—Misnomer—Waiver.—A defect of parties must be raised by demurrer or answer; otherwise the objection is waived. Three persons were named as defendants, with the addition "the board of county commissioners" of a county named. Throughout the proceedings in the court below all parties treated the board of county commissioners as the defendant. *Held* that the county commissioners were bound by the proceeding, and by any order or decree that might be properly made in the court of review.—*Del Monte Co.* v. *Chaffee County*, 340.

New Parties Coming in—Effect.—The beneficiaries in a trust on lands sued to remove a tax title as a cloud upon the title to the lands. The trustee having appeared, answered, and filed his cross-complaint praying the removal of the cloud upon the title. This was held to cure any possible defect in the frame of the suit, so far as related to the extinguishment of the tax title.—*Eagan* v. *Mahoney*, 285.

PARTNERSHIPS.

Definition.—A partnership is a contract expressed or implied, between two or more competent persons, to place their effects, labor and skill, or some of these, in business, and divide the profits and bear the losses, in certain proportions. There must be a unity of interest in the prosecution of the business; and whether or not a partnership exists depends on the intention of the parties.—*Kent v. Cobb*, 264.

Evidence—Burden of Proof.—The burden of establishing a partnership is upon the one who asserts it.—*Kent v. Cobb*, 264.

Much more evidence is required to establish a partnership between husband and wife than between persons not sustaining that relation. That the wife assists the husband, *e. g.*, by keeping the books, and making out and receipting the bills, and that, in speaking of the business, she uses the plural pronoun "we," is not alone sufficient to establish a partnership against the explicit denials of both husband and wife.—*Id.*, 264.

PAYMENT.

By Check.—A check upon a bank which has no funds of the drawer, and has consented to meet the check only by draft on another bank which will only give credit therefor, is no payment.—*Leeper v. Schroeder*, 164.

PLEADING.

Complaint—Joinder of Causes of Action.—The beneficiaries in a trust in lands permitted to demand in one action the execution of the trust, and the annulment of a tax title held by a stranger.—*Eagan v. Mahoney*, 285.

Certainty.—A complaint in an action to remove a cloud from a title, assailing a tax deed, should point out the precise defects in the proceedings which are complained of.

But the lack of particularity in this respect is to be met by a motion to make more specific.—*Scott v. Howell*, 155.

Demurrer.—A demurrer admits all facts which are well pleaded.—*Meyer v. Wright*, 53.

A demurrer alleging ambiguity, uncertainty, etc., and not in any way attempting to show wherein the alleged defect consists will be disregarded (Rev. Code, sec. 57).—*Berry v. French*, 519.

Objection to Sufficiency of Complaint First Taken at Trial.—The practice of first objecting to the sufficiency of the complaint upon the trial condemned.—*Mountain Co. v. Lindekugel*, 100.

Answer After Demurrer Overruled.—The defendant, answering after

PLEADING—Continued

demurrer overruled for ambiguity or uncertainty, waives these causes of demurrer.—*Rosenbaum v. McEwen*, 58.

Supplemental Answer—Discretion—Ejectment.—Defendant served a copy of his answer, but neglected to file it. The cause was set for trial on various occasions, but continued from time to time for more than three years. Then, coming on for trial, it appearing that the answer had never been filed, the court permitted it to be filed as of the day upon which the copy was served, and refused to receive it as of any later date. Defendant then applied for leave to file a supplemental answer setting up an amended tax deed, executed on the day next previous to the trial, supporting the application by an affidavit of his attorney that after the cause was set for trial he discovered that a tax deed upon which he relied was void; that he had made application for an amended deed, but did not know until the day of the trial that it had been executed. Objection being made, the long pendency of the cause, the frequent postponements, that plaintiff and his attorney had come to the trial from a great distance and were not prepared to try the issues presented by the proposed supplemental answer, being suggested as grounds of the objection, the court declined to receive the supplemental answer. *Held* that in view of the evident laches of the defendant, that the amended deed was nowhere in the record shown or even alleged to be a valid deed, that this was not matter of presumption, and that, if void, the deed would have been unavailing, it was not to be said that the court below had, in either ruling, abused its discretion, or that the defendant had been prejudiced thereby.—*Empire Co. v. Millet*, 464.

Waiver.—A defendant in an equity suit who answers both the original complaint and a cross-complaint exhibited against him by co-defendant, will not be heard to deny the right and duty of the court to grant full relief.—*Eagan v. Mahoney*, 285.

What Must Be Specially Pleaded.—In an action of ejectment defendant pleads a prior decree quieting his title, but fails to show that the title then in question was identical with that presented in the ejectment suit. Reply, a general denial, not assailing the judgments so pleaded. Plaintiff may produce the judgment roll showing that the decree was void.—*Empire Co. v. Farmer*, 45.

It is error to vacate, as void, a judgment valid upon its face, not referred to in the pleadings, and the judgment roll of which is not produced.—*Empire Co. v. Lumelius*, 49.

Where plaintiff desires to set aside a tax deed, or a decree of court, the better practice is to assail it in the complaint, or in the reply if it is pleaded in the answer.—*Id.*, 49.

PLEADING—Continued

Where, in an action for possession of lands, defendant relies upon a tax deed as evidence, not having pleaded it, the plaintiff may, by the production of the record of the tax sale, show fatal defects in the proceeding, without pleading such defects in the reply.

What is said to the contrary in *Empire Co. v. Howell*, 23 Colo. App., 386, 128 Pac., 474, is to be limited to cases where a tax deed, valid upon its face, has been sufficiently pleaded.—*Empire Co. v. Howell*, 67.

Cross-Complaint Against Co-Defendant.—The cross-complaint provided for in the code (Rev. Code, secs. 62, 63) is equivalent to a cross bill in equity. One defendant may exhibit a cross-complaint against a co-defendant, seeking affirmative relief.—*Eagan v. Mahoney*, 285.

Judgment Upon the Pleadings.—Where the complaint exhibits a cause of action and there is no counter-claim for the damages to which, alone, as appears by the answer, defendant is entitled, the plaintiff may have judgment upon the pleadings.—*McCrea v. Ford*, 506.

Construed.—The answer as to a certain sum demanded in the complaint averred that defendant "has not sufficient knowledge upon which to base a belief and prays strict proof in respect thereto." Held sufficient to raise an issue.—*McCrea v. Ford*, 506.

Plea to the Jurisdiction.—The general denial does not put in issue the jurisdiction of the court. A special plea is required.—*Empire Co. v. Millet*, 464.

Burden of Proof.—The defendant assailing the jurisdiction of the court has the burden of proof.—*Empire Co. v. Millet*, 464.

Aider by Pleading Over.—Material omissions in the complaint may be supplied by the answer.—*Rosenbaum v. McEwen*, 58; *Mountain Supply Co. v. Lindekugel*, 100.

PLEADING AND EVIDENCE. See TRIALS.

PRACTICE.

Action—Whether Legal or Equitable.—Action to reform a banker's certificate of deposit alleged to have been issued by the mistake of a clerk for a sum largely in excess of the amount deposited, and to restrain the negotiation thereof. Held an equitable action.—*Johnson v. First National Bank*, 23.

Judgment—Failure to Decree Upon Cross-Complaint.—Failure to dispose of a cross-complaint interposed by the defendant is not fatal error. *Pace v. Cline*, 22 Colo. App., 254, followed.—*Park v. McKee*, 11.

PRINCIPAL AND AGENT.

Duty and Disabilities of Agent.—A broker is employed to find a purchaser of mining property for a price named, and is to receive a special commission. Without informing his principal he attempts to sell the property for a very much larger sum. *Held* a palpable violation of the duty which he owed to the principal. *Held* further that if he had succeeded in his effort the principal might have recovered from him, not only what he had received above the price fixed in his employment, but the promised commission as well.—*Sankey v. Cramer*, 16.

Ratification.—One who accepts and acts upon a contract made for his behalf, by an agent, vacating a previous contract, will not be heard to afterwards traverse the agent's authority, as the foundation of an action for the non-performance of the contract so vacated.—*McKay v. Fleming*, 380.

Quantum Meruit—For Services Rendered.—Whoever sues upon a *quantum meruit* for services rendered must establish the employment, the rendition of the service, and the reasonable value thereof.

The evidence examined and held insufficient upon all points.—*Sankey v. Cramer*, 16.

PROMISSORY NOTES.

Provision for an attorney's fee in case of action brought is a valid contract.—*Firestone Co. v. McKissick*, 294.

QUIETING TITLE.

Plaintiff's Title—Evidence—Trustee's Deed—Recitations.—A deed of trust described the trustee as the Nebraska Loan & Trust Co. A deed purporting to be executed by the same company, in pursuance of the sale under the powers of the trust deed, declared in the attestation clause that the grantor had caused "its corporate seal to be attached," and the certificate of acknowledgment, appended thereto, stated that the Nebraska Loan & Trust Co., by, etc., "second vice-president, personally known to me to be the person and officer who executed," etc., acknowledged the same as "the act and deed of said corporation." Held sufficient, *prima facie*, to put the defendant to proof of his title, though no evidence was given of the incorporation of the Nebraska company, its powers, or its compliance with the statutes of this state.

Plaintiff is only required to show possession, or, in case of vacant lands, such title as upon its face confers constructive possession.—*Lougee v. Wilson*, 70.

Objections to plaintiff's title from a defendant showing no title are disregarded.—*Johnson v. Gibson*, 392.

QUIETING TITLE—Continued

Defendant's Title.—It is the defendant and not the plaintiff who must stand or fall upon his own title.—*Lougee v. Wilson*, 70.

Unknown Persons.—It seems that unknown persons may, under the code (sec. 50), be made parties to a suit to quiet the title to lands, and may be concluded by the decree therein.—*Brackett v. McClure*, 524.

Disclaimer of Sole Defendant, charges the plaintiff with notice of the absence of the necessary parties, and puts him upon inquiry.—*Id.*, 524.

Answer.—An answer not specifically denying plaintiff's allegation of ownership, but averring the defendant is the owner and entitled to possession, setting forth the source and nature of his title, puts the plaintiff's title in issue.—*Foster v. Gray*, 247.

Limitation—Laches.—No statute limits the time within which the action may be instituted; nor is laches available as a defense.—*Lougee v. Wilson*, 70.

Personal Property.—Except under special circumstances, equity will not entertain a bill to quiet the title to personalty.—*Central Savings Bank v. Carpenters & Joiners*, 440.

Decree.—A decree quieting title in defendant is not impaired by a clause dismissing plaintiff's action.—*Pelton v. Muntzing*, 1.

In an action under Mills' Code, sec. 255 (Rev. Code, sec. 274), the plaintiff prevailing may have a decree annulling a deed under which his adversary claims, even though the instrument is void upon its face. —*Empire Co. v. Wilson*, 83.

RAILROAD COMPANY.

Movement of Trains.—A railway company switching cars within the premises of a mining company at a time when, as those in charge of the work are aware, the employes of the mining company are liable to be upon or in proximity to the tracks, are under a manifest duty to give a signal or warning when a car is to be set in motion; failing in this the railway company is liable for an injury to a servant of the mining company, who, without fault upon his part, is injured by the neglect.—*Colorado Midland Co. v. Edwards*, 350.

SALE.

Secret Reservation of Title.—Where, in the sale of chattels, possession is delivered to the vendee, a secret reservation of the title to the vendor is void as against creditors of the vendee, or subsequent purchasers from him without notice. The transaction is, in law, an absolute sale.—*Puzzle Co. v. Morse Co.*, 74.

SALE—Continued

Possession Remaining With the Vendor.—A bill of sale, executed by the husband alone, of goods belonging to husband and wife, possession being retained by the two, will not prevail as against a subsequent sale by the two, accompanied by delivery of the possession.—*Mesa County Bank v. Berry*, 487.

Of Machinery to Lessee of Lands.—One who sells mining machinery to the lessee of mining property is under duty to inform himself of the terms of the lease. Failing so to do, he is affected by a provision of the lease that additions made by the lessee become parcel of the realty.—*Puzzle Co. v. Morse Co.*, 74.

Merchant's Stock in Bulk—Executory Contract—Effect Upon the Title.—Sale of a merchant's stock in bulk, to be consummated only after compliance with the statute (Rev. Stat., secs. 2678, 2679). Though possession is delivered, the title remains in the vendor.—*McCrea v. Ford*, 506.

Purchaser Refusing to Proceed—Vendor's Rights.—Where the purchaser of a merchant's stock, in bulk, having made a deposit and received possession, refuses to complete the purchase and surrenders the goods, the seller, if he would insist upon his right, must hold all the goods ready for delivery upon payment of the residue of the stipulated price. If he resumes business and disposes of a substantial part of the stock he can neither enforce specific performance nor demand damages.—*Id.*, 506.

And the mere acceptance of possession waives the right to specific performance.—*Id.*

Damages.—Where, in such case, the seller is entitled to damages he ordinarily recovers the difference between the contract price and the market value at the time and place of delivery.—*Id.*, 506.

Purchaser's Action for Deposit.—The purchase of a merchant's stock is rescinded by the purchaser for alleged frauds of the seller inducing the purchase. He surrenders possession, which the vendor accepts, resuming business and disposing of a substantial part of the stock. The purchaser recovers his deposit.—*Id.*

Purchaser's Refusal to Accept—Seller's Remedy.—Where upon executory agreement for the sale of chattels the purchaser refuses to perform his contract, the seller may (1) store the goods for him and recover the full contract price, or (2) retain the goods and recover the difference between the agreed price and the market price at the time and place specified in the agreement for delivery, or (3) he may sell the goods at the best price obtainable and recover of the purchaser the

SALE—Continued

loss sustained, measured, in general, by the difference between the contract price and the proceeds of the sale.—*Leeper v. Schroeder*, 164.

And where neither title or possession has passed, the seller is not required to give notice to the purchaser of his intention to resell the goods, as a condition precedent to his right to recover what is lost thereby. *Magnes v. Sioux City Co.*, 14 Colo. App., 219, followed.—*Id.*

Nor is it necessary that the particular goods, the subject-matter of the contract, should, before the purchaser's refusal to accept, have been segregated and set apart.—*Id.*

And if the place of delivery affords no market, the vendor may send the goods to the nearest and most available market. One purpose of the re-sale is to establish the true value of the goods, at the time, and not leave this to future controversy; therefore, the subject-matter of the contract being a number of lambs on foot, the place of delivery being Grant, N. M., where there was no market, and the lambs being shipped to Denver and sold there, the market price being clearly established, the fact that some of those actually delivered on re-sale were not fully up to the requirements of the contract, and that some died while in transit, and that some were shipped from another place than that specified for the delivery—the expense of the shipment not being increased—was held unimportant.—*Id.*

SPECIFIC PERFORMANCE.

Indefinite Contract.—A paper referring to the sale of lands, but expressing no consideration, indefinite as to the purchaser, as to the time of payment of deferred installments of the purchase money, containing no express agreement to sell, and no agreement at all by anyone to purchase, will not be specifically enforced.—*Borem v. Concord Co.*, 397.

To specific performance it is required, not only that the contract should be certain and complete in all its terms, but each of its terms must be so clearly and exactly expressed that the court may proceed with reasonable certainty.—*Riverside Co. v. Sawyer*, 442.

Partial Enforcement is allowed only when justice and equity to all parties can be accomplished.

An agreement provided (1) that plaintiff should assign to defendant an option upon a certain ranch and the water rights thereto appurtenant, and provide an "adequate water supply" for the land, "using the water now going with the land, and such additions thereto as may be necessary to irrigate all of the land" which defendant might cultivate; (2) that defendant, upon consummation of the purchase of the land, pursuant to the option, should "transfer or enter into an agreement to transfer" to plaintiff all such water rights and "put the entire

SPECIFIC PERFORMANCE—Continued

tillable portion of the tract into an irrigation district," afterwards to be organized; (3) that plaintiff would, upon the formation of the irrigation district, transfer to defendant bonds thereof, "representing the acreage placed in the district" by defendant, and "enter into an agreement to furnish" defendant "sufficient water to water all of the land that was or should be in cultivation at any time before water could be furnished therefor, under the irrigation district." Considering that the parties might never agree as to what would be "an adequate water supply," or as to what additions to the existing supply would be necessary, or as to what land defendant might be cultivating, that if the first part of the contract should be enforced and the irrigation district never organized, the defendant would own the land and the plaintiff the water rights, with no agreement between them as to how or upon what terms water should be furnished, that if disagreements as to these matters should arise the court would be powerless to compel them to enter into any contract, that these and many other obstacles, possible under the terms of the writing, presented an impossible barrier to specific performance of any feature of the agreement.—*Riverside Co. v. Sawyer*, 442.

Damages.—Held in the same case that plaintiff might proceed for damages.—*Id.*

Conditional Tender of Payment.—Vendee of lands who, in tendering payment of the agreed price, demands a conveyance not warranted by the agreement of purchase is not entitled to specific performance.—*Castrilla v. Velotta*, 95.

SOCIETY.

Rights of Seceding Members.—Members of an unincorporated society voluntarily retired from the organization. Held they had no right in funds deposited to the credit of the society.—*Central Savings Bank v. Carpenters & Joiners*, 440.

STATUTES.

Construction.—A statute will not be so construed as to occasion injustice if it is susceptible of another interpretation.—*Ellison v. Tuckerman*, 322.

Construed, Cited or Referred to—

Rev. Stat., Sec. 515.—*Ellison v. Tuckerman*, 322.

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Rev. Stat., Sec. 695.—*Eagan v. Mahoney*, 285.

Rev. Stat., Sec. 865.—*Firestone Co. v. McKissick*, 294.

STATUTES—Continued

Construed, Cited or Referred to—Continued.

Rev. Stat., Sec. 1181.—*Del Monte Co. v. Chaffee County*, 340.
Rev. Stat., Sec. 1527.—*Empire Co. v. Millett*, 464.
Rev. Stat., Sec. 2600.—*Tebow v. Teller*, 239.
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Rev. Stat., Sec. 2679.—*Id.*
Rev. Stat., Sec. 3022.—*Johnson v. First National Bank*, 23.
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Rev. Stat., Sec. 3933.—*Gilbreath v. Doe*, 205.
Rev. Stat., Sec. 4013.—*Ellison v. Tuckerman*, 322.
Rev. Stat., Sec. 4025.—*Fisher v. McPhee & McGinnity Co.*, 420.
Rev. Stat., Sec. 4029.—*Id.*
Rev. Stat., Sec. 4033.—*Id.*
Rev. Stat., Sec. 4073.—*Nisbet v. Cristler*, 514.
Rev. Stat., Sec. 4090.—*Callahan v. Reinhardt*, 199; *Empire Co. v. Battelle*, 375; *Johnson v. Gibson*, 392; *Empire Co. v. Patterson*, 395; *Empire Co. v. Howell*, 67.
Rev. Stat., Sec. 5665.—*Gilbreath v. Doe*, 205.
Rev. Stat., Sec. 5708.—*Pelton v. Muntzing*, 1; *Brackett v. McClure*, 524.
Rev. Stat., Sec. 5709.—*Id.*
Rev. Stat., Sec. 5713.—*Emerson v. Valdez*, 458.
Rev. Stat., Sec. 5726.—*Pelton v. Muntzing*, 1.
Rev. Stat., Sec. 5727.—*Sheesley v. Voorhees*, 428.
Rev. Stat., Sec. 5729.—*Emerson v. Valdez*, 458.
Rev. Stat., Sec. 5730.—*Pelton v. Muntzing*, 1.
Rev. Stat., Sec. 5733.—*Empire Co. v. Howell*, 417; *Eagan v. Mahoney*, 285; *Sheesley v. Voorhees*, 428; *Empire Co. v. Battelle*, 375; *Scott v. Conrad*, 452; *Callahan v. Reinhardt*, 199.
Rev. Stat., Sec. 5837.—*Del Monte Co. v. Chaffee County*, 340.
Rev. Stat., Sec. 7071.—*Burnham v. Grant*, 131.
Rev. Stat., Sec. 7267.—*Id.*
Rev. Stat., Sec. 7284.—*Grand Lodge v. Taylor*, 106.
Rev. Code, Sec. 38.—*Carroll v. Kit Carson Co.*, 217.
Rev. Code, Sec. 50.—*Brackett v. McClure*, 524.
Rev. Code, Sec. 57.—*Berry v. French*, 519.
Rev. Code, Secs. 62-63.—*Eagan v. Mahoney*, 285.
Rev. Code, Sec. 115.—*Weiss v. Ahrens*, 531.
Rev. Code, Sec. 236.—*Burnham v. Grant*, 131.

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Rev. Code, Sec. 274.—*Empire Co. v. Wilson*, 83; *Eagan v. Mahoney*, 285.

Rev. Code, Sec. 286.—*Tebow v. Teller*, 239.

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Rev. Code, Sec. 416.—*Gibson v. Foster*, 252.

Rev. Code, Sec. 423.—*Abernathy v. Wright*, 36.

Rev. Code, Sec. 433.—*Del Monte Co. v. Chaffee County*, 340.

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A notice of tax sale posted on Sunday takes effect, at least, on the following Monday.—*Pelton v. Muntzing*, 1.

TAX TITLES.

Tax Sale—Effect.—A tax sale regular in all things, and the deed of the treasurer executed pursuant thereto, extinguishes existing titles and vests paramount title in the grantee.—*Gibson v. Bragg*, 463.

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Sale—Notice.—Ejectment for a quarter-section of land. The defendant claimed under a tax deed. The assessment roll upon which the tax sale was based described the tract in question as containing 160 acres; the notice of the tax sale, as published, described it as 36 acres; the notice posted by the treasurer as 60 acres.

The sale was had under the statute of 1891 (Laws 1891, 286, sec. 6).

Held that there was a substantial departure from the statute, fatal to the validity of the sale.—*Callbreath v. Hapney*, 202.

The affidavit of the publication of the notice of a tax sale, required of the publisher by Rev. Stat., sec. 5709, must contain not only what is specified in that section, but also the statement required by Rev. Stat., sec. 3933. A tax deed issued pursuant to a sale, the notice of the publication of which is not shown in the manner required by the statute to have been made in a newspaper of the class specified in the statute, is void.—*Gilbreath v. Doe*, 205.

The affidavit of publication of the notice of a tax sale may be amended.—*Gilbreath v. Doe*, 205.

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A deed which fails to show that notice was given by the tax purchaser of his intention to apply for a deed, as required by the statute (Rev. Stat., sec. 5727), and proof thereof made, or that the assessed valuation was such that notice was not required, is not *prima facie* evidence of title, and is not admissible in evidence without proof of the notice, or that it was not required.—*Id.*

The setting forth of the deed in *haec verba* by the opposing party in his pleadings does not supply the defect of such preliminary proofs. —*Id.*

Deed—Acknowledgment.—A treasurer's deed not acknowledged substantially as prescribed by statute, is void. The acknowledgment must be made by the person who executed the conveyance, and this must appear from the instrument itself. A deed purporting to be executed by the treasurer in person, bearing a certificate that it was acknowledged by his deputy, must be rejected.

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TAX TITLES—Continued

treasurer will not be received to raise the presumption that in fact the deed was subscribed by the deputy.—*Little* v. *Howell*, 128.

Evidence Aliunde to Avoid Deed.—A tax deed fair upon its face may be invalidated by evidence aliunde, e. g. that the land was assessed as a quarter section, and was sold in separate forty-acre tracts; or that no proper affidavit of the posting of the notice of sale, as required by statute (Rev. Stat., sec. 5700), was filed.—*Brockett* v. *McClure*, 524.

Redemption—Effect on Prior Sale.—A sale for taxes from which redemption is made by the purchaser at a prior sale is without effect to impair the right of such prior purchaser.—*Pelton* v. *Muntzing*, 1.

Void Deed.—A treasurer's deed which fails to describe the lands sold, is void.—*Riley* v. *Lemasters*, 184.

So a tax deed which shows upon its face that non-contiguous lands were sold to the county for a gross sum is void.—*Callahan* v. *Reinhardt*, 199.

So, the county being the purchaser, if it appears that the certificate was assigned by the county clerk more than three years after the date of the sale.—*Id.*

Deed upon sale *en masse* of contiguous tracts not returned by the same person is void. (Rev. Stat., sec. 5705.)—*Gilbreath* v. *Doe*, 205.

Strict compliance with the statute must be shown to sustain a sale of land for the non-payment of the tax.—*Id.*

A treasurer's deed which shows the sale of non-contiguous tracts for a gross sum; or that the lands were struck off to the county on the first day of the sale; or which fails to show by apt words what lands were sold, is void.—*Foster* v. *Gray*, 247.

A treasurer's deed which recites only that copies of one publication of the newspaper containing the notice of the sale were delivered to each subscriber in the county where the lands are situated is void.—*Eagan* v. *Mahoney*, 285.

A treasurer's deed founded upon a sale to the county and an assignment of the certificate of purchase by the county clerk, more than three years after the date of the sale, is void.—*Empire Co.* v. *Battelle*, 375.

A treasurer's deed reciting the sale of several non-contiguous tracts *en masse* for a gross sum; that the lands were stricken off to the county on the first day of the sale; and that the certificate of purchase was assigned by the county clerk more than three years after the date of the sale, is void.—*Johnson v. Gibson*, 392.

So where, the deed reciting a sale to the county, it fails to show by what officer the certificate was assigned.—*Id.*

A tax deed not recorded conveys no title. An admission of its exe-

TAX TITLES—Continued

cution, with a denial that it was recorded, does not admit its *prima facie* validity.—*Scott v. Conrad*, 452.

A treasurer's deed which shows upon its face that the lands were struck off to the county on the same day on which they were first offered; or which, being based upon a sale to the county and an assignment of the certificate, fails to show by what officer the assignment was made; or which fails to show the date of the sale, is void.—*Emerson v. Valdez*, 458.

A tax deed which, showing a sale of the land to the county, recites an assignment of the certificate of purchase by the county "by its proper officers" is not a compliance with the statute (Rev. Stat., sec. 5729).—*Id.*, 458.

A treasurer's deed which fails to show notice given of an intention to apply therefor, nor that the assessment was such that notice was not required, is void.—*Eagan v. Mahoney*, 285.

Amended Deed—Construction.—A tax deed was excluded as void upon its face, because showing a sale to the county, and an assignment of the certificate made by the county clerk after the lapse of more than three years from the date of the sale. A second deed, issued upon the same sale, failed to show either the date of the assignment or what officer made it, but did show that it was authorized by the county commissioners during the same month appearing in the first deed. Held, that the two deeds were to be taken together, and that the latter deed was properly excluded.—*Empire Co. v. Lumelius*, 49.

Where an amended deed by the treasurer is offered in connection with the original, the two are construed together, and where the original recites a sale to the county, and an assignment of the certificate by the county clerk, more than three years after the date of the sale, and nothing to the contrary appears in the amended deed, both are void.—*Johnson v. Gibson*, 392.

Deed Not in Evidence, will not be considered.

Delay in Applying for Tax Deed.—Under Rev. Stat., sec. 5726, the purchaser at a tax sale may apply for his deed at any time after the lapse of three years from the date of the sale, within the period of prescription.—*Pelton v. Muntzing*, 1.

Evidence Aliunde to Show Compliance With the Statute, the Deed Being Void Upon Its Face, is not admissible upon the hearing of a bill to quiet the title asserted under such deed. In an action to reform the deed, it may be otherwise.—*Emerson v. Valdez*, 458.

Second Sale After Sale to County Not Redeemed.—Under Rev. Stat., sec. 5713, a sale for taxes, though upon due advertisement, after a sale

TAX TITLES—Continued

of the same lands to the county which is still unredeemed and the lands unsold, is void.—*Emerson v. Valdez*, 458.

Removing Cloud From Title—Offer to Refund Taxes.—Failure to tender a return of the taxes paid by defendant is waived by an answer claiming title under the tax deed.—*Scott v. Howell*, 155.

Recovery of Taxes. paid by the claimant under the tax title is not allowed without proof of the amount paid. The burden is upon him to prove the amount.—*Eagan v. Mahoney*, 285.

TENDER.

Conditional.—Vendee of lands who, in tendering payment of the agreed price, demands a conveyance not warranted by the agreement of purchase is not entitled to specific performance.—*Castrilla v. Velotta*, 95.

TIME.

Computation of.—It is proper to exclude the first day of the period and include the last, or *vice versa*.—*Pelton v. Muntsing*, 1.

Fractions of a day are not regarded in computing the time during which process must be in the hands of the sheriff, in order to warrant publication. (Mills' Code, sec. 382; Rev. Code, sec. 416). The first day is excluded and the last included. Service of summons by publication. The summons was issued May 1st and returned May 11th, not found. *Held* sufficient to warrant publication.—*Gibson v. Foster*, 252.

TRIALS.

By the Court.—The judge presiding is not to refer to his own knowledge to supply defects in the evidence of essential facts.—*Monte Vista Co. v. Centennial Co.*, 496.

Conduct of Judge Presiding.—The judge presiding in a litigated cause should exercise great caution and self-restraint in the exercise of his authority.

In an action for negligence, in which, at the end of a trial occupying two days the plaintiff recovered a verdict, the judge presiding, on the first day of the trial, called before him two witnesses who had been examined for the defense, denounced them as wilful perjurers and ordered them to give bail to answer to that charge. The jury had been excused, but this proceeding was had in the presence of the parties, their counsel, and all connected with the cause, and an account of it was published in one of the newspapers of the city on the same evening. The evidence of negligence was vague and unsatisfactory. The defense gave no satisfactory explanation of the circumstances shown in the testimony for the plaintiff. Considering that the drastic action of

TRIALS—Continued

his honor must have had the effect not only to terrorize the witnesses in question, but to overawe other witnesses whom the defendant might have desired to call, and that thereby the defendant might have suffered prejudice, the judgment was reversed, and a new trial awarded. —*Hill v. Sullivan*, 86.

Equity Causes.—All issues joined in an equity cause are tried by the court. The presiding judge may, in his discretion, submit questions of fact to a jury, but their verdict is merely advisory and the presiding justice may reject it if not approved by his conscience.—*Weiss v. Ahrens*, 531.

Questions for Jury.—In an action for negligence, all questions of fact are for the jury.—*Denver v. Rhodes*, 114.

Directing Verdict.—Where the plaintiff establishes a clear title to the relief which he demands the court should direct the verdict.—*Nathan v. Crouse*, 32.

Objection to Sufficiency of Complaint at Trial.—The practice of first objecting to the sufficiency of the complaint upon the trial condemned.—*Mountain Supply Co. v. Lindekugel*, 100.

Stipulation of Counsel—Mistake.—Stipulations of counsel as to the facts of the cause will not be vacated upon any lower grounds than would warrant the rescission of a contract, *e. g.*, fraud, collusion, surprise, mistake, or the like.

And application should be seasonably made in the trial court. Plaintiff in ejectment stipulated that one Z, from whom he derived title, was defendant in a certain cause named, and that in said action before Z's conveyance a decree was entered quieting the title in defendant. The record produced showed that in fact Z was not a party to that action. No suggestion of a mistake was made in the court below, nor was error directly assigned thereon. *Held* that plaintiff was concluded by the stipulation.—*Gibson v. Foster*, 252.

The Order of Evidence, is in the discretion of the court. Held proper to elicit from an officer of defendant, on re-examination, an admission of the plaintiff, without laying any foundation, *e. g.*, by an examination as to time, place, and persons present.—*Koch v. Denver*, 406.

Directed Verdict.—The evidence being insufficient to support a judgment for plaintiff, who was the plaintiff in error, the judgment of the district court on a directed verdict affirmed.—*Schildt v. Cimarron & Uncompahgre Co.*, 259.

Where the evidence leaves the facts in any substantial degree doubtful, or fair-minded men might reach different conclusions there-

TRIALS—Continued

from, the issue must be left to the jury. So, even though there be no conflict in the evidence, if the result depends upon what inferences fair and reasonable men may draw therefrom.—*Fagan v. Troutman*, 473.

Pleading and Evidence—Matters Not in Issue.—To receive evidence of misconduct of plaintiff toward defendant, nowhere alleged in the pleading, is error.—*Wilmore v. Kalberer*, 209.

Evidence of matters nowhere alleged in the pleading is not to be admitted.—*Sankey v. Cramer*, 16.

Plaintiff declared as at common law for the use and occupation of lands. In fact, defendant's occupation was tortious, and this appeared by the answer and reply. Upon the trial no objection was made to the sufficiency of the complaint, or that the evidence presented by plaintiff was inadmissible thereunder. *Held* that any insufficiency or lack of form in the complaint was cured.—*Nathan v. Crouse*, 32.

Trial Upon a Theory Variant From the Complaint, by consent of the parties, waives defects in the complaint.—*Burnett v. Lindsey*, 201.

Where, by consent of the parties, the sole question tried in the court below is one not presented by the pleadings, the defeated party will not be heard to complain, upon appeal, that the judgment is without the issues.—*Sorenson v. Norell*, 470.

USE AND OCCUPATION. See LANDLORD AND TENANT.

VENDOR AND VENDEE.

Vendor Unable to Convey in Part—Abatement of Price.—One who agrees to convey a body of land for a specified consideration, and, by his own act, renders himself incapable of wholly fulfilling his contract, may, at suit of the purchaser, be required to convey all that he is able to convey, with an abatement in the agreed price equal to the difference in value between what was agreed for and what is conveyed.—*Wellington Co. v. Gilbert*, 118.

VENDOR AND PURCHASER.

Duty to Record Agreement.—One who enters into an agreement for the sale of land to a corporation is not under duty to the stockholders of such corporation to record the agreement. Nor can such vendor be charged with frauds practiced by the promoters of the corporation upon those purchasing stock, of which the vendor has no knowledge, even although his conveyance has vested title in the corporation, and the omission to record an agreement touching purchase money facilitates the commission of the frauds.—*Firestone Co. v. McKissick*, 294.

VERDICT.

Construed.—Defendants gave bond to plaintiff conditioned that the principal therein should return to the registry of the court whereof plaintiff was clerk so much of $1,000, received by him, as, in a cause to be afterwards instituted, it might be determined that he was not entitled to retain as his fee as an attorney in a certain cause theretofore depending. The action being afterwards instituted, the jury rendered a verdict in favor of the attorney, in the sum of $200.00. These facts appearing by the answer in an action upon the bond, *held*, that the plaintiff was entitled to judgment on the pleadings; that the verdict imported that the entire fee to which the attorney was entitled was $200.00, and not that sum in addition to the $1,000; that the answer presented no issue of fact.—*Shwayder v. Clay*, 336.

WATER RIGHTS.

Natural Stream Used as a Conduit—Right of Appropriator.—An appropriator who uses the channel of a natural stream to convey the water of his appropriation is entitled to take from the stream only such volume as he may measure, recapture from the stream, and actually apply to beneficial uses, due allowance being made for loss in transit from the point of measurement to the point of recaption. What he fails to so apply may be distributed to other appropriators, according to their priorities.—*Sorenson v. Norrell*, 470.

Change of Point of Diversion—Who May Apply For.—A mutual ditch company, carrying water for the use of its members only, though neither owning or irrigating any land, may, in virtue of its relation to its shareholders and as their trustee, petition under the statutes.—*Monte Vista Co. v. Centennial Co.*, 496.

Effect of Decree.—A decree granted under the provisions of sections 3226-3231 of the Revised Statutes is, in effect, a modification of the general decree adjudicating priorities in the water district.—*Id.*, 496.

Evidence—Burden of Proof.—The burden of establishing that the proposed change will not injuriously affect the vested rights of others is upon the petitioners. The protestants have not the burden of establishing the contrary.—*Monte Vista Co. v. Centennial Co.*, 496.

The question what will be the effect of the change, whether injurious or harmless, is the ultimate fact to be determined from evidence of the conditions which have previously prevailed and the conditions which will ensue if the change is permitted. The opinions of witnesses not based upon any facts or conditions in evidence will not satisfy the rule nor make a *prima facie* case.—*Monte Vista Co. v. Centennial Co.*, 496.

And the judge presiding is not at liberty to act upon his personal knowledge.—*Id.*

WATER RIGHTS—Continued

The evidence examined and held entirely insufficient to sustain the petition.—*Id.*

When the Change Will Be Granted.—Where it appears that substantial injury must inevitably result to those protesting, the fact that, by allowing the change, many more acres will be irrigated and many more persons served, will not avail to support the application.—*Id.*

See IRRIGATION.

WILLS.

Validity—Duty of Testator to Family.—A testator is under no duty to provide for collateral relatives. Even the parent may disinherit a child.—*Burnham v. Grant*, 131.

Execution and Attestation—Presence of Attesting Witnesses.—If in the act of attesting the will the witnesses are where the testator can see them if he desires, they are in his presence within the meaning of the statute. (Mills' Stat., Rev. Sup., 4664; Rev. Stat., sec. 7071.)—*Burnham v. Grant*, 131.

Request of Testator.—There is no requirement in the statute (Rev. Stat., sec. 7071) that the testator should request the witnesses to attest the will.—*Burnham v. Grant*, 131.

Probate—Contest—Competency of Witnesses.—Brothers and sisters of the devisee are competent witnesses to sustain the will. (Mills' Stat., sec. 4816; Rev. Stat., sec. 7267.)—*Burnham v. Grant*, 131.

Credit of Witnesses.—The law does not impute to relatives of interested parties, testifying in a will contest, less integrity than other witnesses, but their testimony is received with caution.—*Id.*, 131.

Letters of Testator.—Where contestants of a will alleged that the testator was of unsound mind and had been unable to transact business for years prior to the execution of the testament, letters of the deceased written during that period are admissible upon such issue.—*Id.*, 131.

Letters of Contestant.—Self-serving letters of the contestant are not admissible in his behalf. (Rev. Stat., sec. 7267.)—*Id.*, 131.

Evidence—Experts' Testimony is not entitled to greater weight than that of non-professional witnesses. The attention of the jury should not be specially called to it, either in the way of commendation or condemnation.—*Id.*, 131.

Examination of Witness—Hypothetical Question.—A hypothetical question assuming facts not established by evidence, and which no evidence tends to establish, must be excluded.—*Id.*, 131.

WORDS AND PHRASES.

"*Unmarried.*"—A stipulation made during the trial of a bill to quiet the title to land, that a person named, the former proprietor of the lands, "died unmarried," imports that he never married, and left no descendants.—***Riley v. Lemieux***, 184.

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A treasurer's deed which recites only that copies of one publication of the newspaper containing the notice of the sale were delivered to each subscriber in the county where the lands are situated is void.—*Eagan v. Mahoney*, 285.

A treasurer's deed founded upon a sale to the county and an assignment of the certificate of purchase by the county clerk, more than three years after the date of the sale, is void.—*Empire Co. v. Battelle*, 375.

A treasurer's deed reciting the sale of several non-contiguous tracts *en masse* for a gross sum; that the lands were stricken off to the county on the first day of the sale; and that the certificate of purchase was assigned by the county clerk more than three years after the date of the sale, is void.—*Johnson v. Gibson*, 392.

So where, the deed reciting a sale to the county, it fails to show by what officer the certificate was assigned.—*Id.*

A tax deed not recorded conveys no title. An admission of its exe-

cution, with a denial that it was recorded, does not admit its *prima facie* validity.—*Scott v. Conrad*, 452.

A treasurer's deed which shows upon its face that the lands were struck off to the county on the same day on which they were first offered; or which, being based upon a sale to the county and an assignment of the certificate, fails to show by what officer the assignment was made; or which fails to show the date of the sale, is void.—*Emerson v. Valdez*, 458.

A tax deed which, showing a sale of the land to the county, recites an assignment of the certificate of purchase by the county "by its proper officers" is not a compliance with the statute (Rev. Stat., sec. 5729).—*Id.*, 458.

A treasurer's deed which fails to show notice given of an intention to apply therefor, nor that the assessment was such that notice was not required, is void.—*Eagan v. Mahoney*, 285.

Amended Deed—Construction.—A tax deed was excluded as void upon its face, because showing a sale to the county, and an assignment of the certificate made by the county clerk after the lapse of more than three years from the date of the sale. A second deed, issued upon the same sale, failed to show either the date of the assignment or what officer made it, but did show that it was authorized by the county commissioners during the same month appearing in the first deed. Held, that the two deeds were to be taken together, and that the latter deed was properly excluded.—*Empire Co. v. Lumelius*, 49.

Where an amended deed by the treasurer is offered in connection with the original, the two are construed together, and where the original recites a sale to the county, and an assignment of the certificate by the county clerk, more than three years after the date of the sale, and nothing to the contrary appears in the amended deed, both are void.—*Johnson v. Gibson*, 392.

Deed Not in Evidence, will not be considered.

Delay in Applying for Tax Deed.—Under Rev. Stat., sec. 5726, the purchaser at a tax sale may apply for his deed at any time after the lapse of three years from the date of the sale, within the period of prescription.—*Pelton v. Muntzing*, 1.

Evidence Aliunde to Show Compliance With the Statute, the Deed Being Void Upon Its Face, is not admissible upon the hearing of a bill to quiet the title asserted under such deed. In an action to reform the deed, it may be otherwise.—*Emerson v. Valdez*, 458.

Second Sale After Sale to County Not Redeemed.—Under Rev. Stat., sec. 5713, a sale for taxes, though upon due advertisement, after a sale

TAX TITLES—Continued

of the same lands to the county which is still unredeemed and the lands unsold, is void.—*Emerson v. Valdez*, 458.

Removing Cloud From Title—Offer to Refund Taxes.—Failure to tender a return of the taxes paid by defendant is waived by an answer claiming title under the tax deed.—*Scott v. Howell*, 155.

Recovery of Taxes. paid by the claimant under the tax title is not allowed without proof of the amount paid. The burden is upon him to prove the amount.—*Eagan v. Mahoney*, 285.

TENDER.

Conditional.—Vendee of lands who, in tendering payment of the agreed price, demands a conveyance not warranted by the agreement of purchase is not entitled to specific performance.—*Castrilla v. Velotta*, 95.

TIME.

Computation of.—It is proper to exclude the first day of the period and include the last, or *vice versa.*—*Pelton v. Muntzing*, 1.

Fractions of a day are not regarded in computing the time during which process must be in the hands of the sheriff, in order to warrant publication. (Mills' Code, sec. 382; Rev. Code, sec. 416). The first day is excluded and the last included. Service of summons by publication. The summons was issued May 1st and returned May 11th, not found. *Held* sufficient to warrant publication.—*Gibson v. Foster*, 252.

TRIALS.

By the Court.—The judge presiding is not to refer to his own knowledge to supply defects in the evidence of essential facts.—*Monte Vista Co. v. Centennial Co.*, 496.

Conduct of Judge Presiding.—The judge presiding in a litigated cause should exercise great caution and self-restraint in the exercise of his authority.

In an action for negligence, in which, at the end of a trial occupying two days the plaintiff recovered a verdict, the judge presiding, on the first day of the trial, called before him two witnesses who had been examined for the defense, denounced them as wilful perjurers and ordered them to give bail to answer to that charge. The jury had been excused, but this proceeding was had in the presence of the parties, their counsel, and all connected with the cause, and an account of it was published in one of the newspapers of the city on the same evening. The evidence of negligence was vague and unsatisfactory. The defense gave no satisfactory explanation of the circumstances shown in the testimony for the plaintiff. Considering that the drastic action of

his honor must have had the effect not only to terrorize the witnesses in question, but to overawe other witnesses whom the defendant might have desired to call, and that thereby the defendant might have suffered prejudice, the judgment was reversed, and a new trial awarded. —*Hill v. Sullivan*, 86.

Equity Causes.—All issues joined in an equity cause are tried by the court. The presiding judge may, in his discretion, submit questions of fact to a jury, but their verdict is merely advisory and the presiding justice may reject it if not approved by his conscience.—*Weiss v. Ahrens*, 531.

Questions for Jury.—In an action for negligence, all questions of fact are for the jury.—*Denver v. Rhodes*, 114.

Directing Verdict.—Where the plaintiff establishes a clear title to the relief which he demands the court should direct the verdict.—*Nathan v. Crouse*, 32.

Objection to Sufficiency of Complaint at Trial.—The practice of first objecting to the sufficiency of the complaint upon the trial condemned.—*Mountain Supply Co. v. Lindekugel*, 100.

Stipulation of Counsel—Mistake.—Stipulations of counsel as to the facts of the cause will not be vacated upon any lower grounds than would warrant the rescission of a contract, *e. g.*, fraud, collusion, surprise, mistake, or the like.

And application should be seasonably made in the trial court. Plaintiff in ejectment stipulated that one Z, from whom he derived title, was defendant in a certain cause named, and that in said action before Z's conveyance a decree was entered quieting the title in defendant. The record produced showed that in fact Z was not a party to that action. No suggestion of a mistake was made in the court below, nor was error directly assigned thereon. *Held* that plaintiff was concluded by the stipulation.—*Gibson v. Foster*, 252.

The Order of Evidence, is in the discretion of the court. Held proper to elicit from an officer of defendant, on re-examination, an admission of the plaintiff, without laying any foundation, *e. g.*, by an examination as to time, place, and persons present.—*Koch v. Denver*, 406.

Directed Verdict.—The evidence being insufficient to support a judgment for plaintiff, who was the plaintiff in error, the judgment of the district court on a directed verdict affirmed.—*Schildt v. Cimarron & Uncompahgre Co.*, 259.

Where the evidence leaves the facts in any substantial degree doubtful, or fair-minded men might reach different conclusions there-

TRIALS—Continued

from, the issue must be left to the jury. So, even though there be no conflict in the evidence, if the result depends upon what inferences fair and reasonable men may draw therefrom.—*Fagan v. Troutman*, 473.

Pleading and Evidence—Matters Not in Issue.—To receive evidence of misconduct of plaintiff toward defendant, nowhere alleged in the pleading, is error.—*Wilmore v. Kalberer*, 209.

Evidence of matters nowhere alleged in the pleading is not to be admitted.—*Sankey v. Cramer*, 16.

Plaintiff declared as at common law for the use and occupation of lands. In fact, defendant's occupation was tortious, and this appeared by the answer and reply. Upon the trial no objection was made to the sufficiency of the complaint, or that the evidence presented by plaintiff was inadmissible thereunder. *Held* that any insufficiency or lack of form in the complaint was cured.—*Nathan v. Crouse*, 32.

Trial Upon a Theory Variant From the Complaint, by consent of the parties, waives defects in the complaint.—*Burnett v. Lindsey*, 201.

Where, by consent of the parties, the sole question tried in the court below is one not presented by the pleadings, the defeated party will not be heard to complain, upon appeal, that the judgment is without the issues.—*Sorenson v. Norell*, 470.

USE AND OCCUPATION. See LANDLORD AND TENANT.

VENDOR AND VENDEE.

Vendor Unable to Convey in Part—Abatement of Price.—One who agrees to convey a body of land for a specified consideration, and, by his own act, renders himself incapable of wholly fulfilling his contract, may, at suit of the purchaser, be required to convey all that he is able to convey, with an abatement in the agreed price equal to the difference in value between what was agreed for and what is conveyed.—*Wellington Co. v. Gilbert*, 118.

VENDOR AND PURCHASER.

Duty to Record Agreement.—One who enters into an agreement for the sale of land to a corporation is not under duty to the stockholders of such corporation to record the agreement. Nor can such vendor be charged with frauds practiced by the promoters of the corporation upon those purchasing stock, of which the vendor has no knowledge, even although his conveyance has vested title in the corporation, and the omission to record an agreement touching purchase money facilitates the commission of the frauds.—*Firestone Co. v. McKissick*, 294.

VERDICT.

Construed.—Defendants gave bond to plaintiff conditioned that the principal therein should return to the registry of the court whereof plaintiff was clerk so much of $1,000, received by him, as, in a cause to be afterwards instituted, it might be determined that he was not entitled to retain as his fee as an attorney in a certain cause theretofore depending. The action being afterwards instituted, the jury rendered a verdict in favor of the attorney, in the sum of $200.00. These facts appearing by the answer in an action upon the bond, *held*, that the plaintiff was entitled to judgment on the pleadings; that the verdict imported that the entire fee to which the attorney was entitled was $200.00, and not that sum in addition to the $1,000; that the answer presented no issue of fact.—*Shwayder v. Clay*, 336.

WATER RIGHTS.

Natural Stream Used as a Conduit—Right of Appropriator.—An appropriator who uses the channel of a natural stream to convey the water of his appropriation is entitled to take from the stream only such volume as he may measure, recapture from the stream, and actually apply to beneficial uses, due allowance being made for loss in transit from the point of measurement to the point of recaption. What he fails to so apply may be distributed to other appropriators, according to their priorities.—*Sorenson v. Norrell*, 470.

Change of Point of Diversion—Who May Apply For.—A mutual ditch company, carrying water for the use of its members only, though neither owning or irrigating any land, may, in virtue of its relation to its shareholders and as their trustee, petition under the statutes.—*Monte Vista Co. v. Centennial Co.*, 496.

Effect of Decree.—A decree granted under the provisions of sections 3226-3231 of the Revised Statutes is, in effect, a modification of the general decree adjudicating priorities in the water district.—*Id.*, 496.

Evidence—Burden of Proof.—The burden of establishing that the proposed change will not injuriously affect the vested rights of others is upon the petitioners. The protestants have not the burden of establishing the contrary.—*Monte Vista Co. v. Centennial Co.*, 496.

The question what will be the effect of the change, whether injurious or harmless, is the ultimate fact to be determined from evidence of the conditions which have previously prevailed and the conditions which will ensue if the change is permitted. The opinions of witnesses not based upon any facts or conditions in evidence will not satisfy the rule nor make a *prima facie* case.—*Monte Vista Co. v. Centennial Co.*, 496.

And the judge presiding is not at liberty to act upon his personal knowledge.—*Id.*

WATER RIGHTS—Continued

The evidence examined and held entirely insufficient to sustain the petition.—*Id.*

When the Change Will Be Granted.—Where it appears that substantial injury must inevitably result to those protesting, the fact that, by allowing the change, many more acres will be irrigated and many more persons served, will not avail to support the application.—*Id.*

See IRRIGATION.

WILLS.

Validity—Duty of Testator to Family.—A testator is under no duty to provide for collateral relatives. Even the parent may disinherit a child.—*Burnham v. Grant*, 131.

Execution and Attestation—Presence of Attesting Witnesses.—If in the act of attesting the will the witnesses are where the testator can see them if he desires, they are in his presence within the meaning of the statute. (Mills' Stat., Rev. Sup., 4664; Rev. Stat., sec. 7071.)—*Burnham v. Grant*, 131.

Request of Testator.—There is no requirement in the statute (Rev. Stat., sec. 7071) that the testator should request the witnesses to attest the will.—*Burnham v. Grant*, 131.

Probate—Contest—Competency of Witnesses.—Brothers and sisters of the devisee are competent witnesses to sustain the will. (Mills' Stat., sec. 4816; Rev. Stat., sec. 7267.)—*Burnham v. Grant*, 131.

Credit of Witnesses.—The law does not impute to relatives of interested parties, testifying in a will contest, less integrity than other witnesses, but their testimony is received with caution.—*Id.*, 131.

Letters of Testator.—Where contestants of a will alleged that the testator was of unsound mind and had been unable to transact business for years prior to the execution of the testament, letters of the deceased written during that period are admissible upon such issue.—*Id.*, 131.

Letters of Contestant.—Self-serving letters of the contestant are not admissible in his behalf. (Rev. Stat., sec. 7267.)—*Id.*, 131.

Evidence—Experts' Testimony is not entitled to greater weight than that of non-professional witnesses. The attention of the jury should not be specially called to it, either in the way of commendation or condemnation.—*Id.*, 131.

Examination of Witness—Hypothetical Question.—A hypothetical question assuming facts not established by evidence, and which no evidence tends to establish, must be excluded.—*Id.*, 131.

WORDS AND PHRASES.

"*Unmarried.*"—A stipulation made during the trial of a bill to quiet the title to land, that a person named, the former proprietor of the lands, "died unmarried," imports that he never married, and left no descendants.—*Riley v. Lemieux*, 184.

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